

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

— — —

COMCAST CABLE : CIVIL NO. 12-859
COMMUNICATIONS, LLC, :
et al., :
Plaintiff :
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:
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v. :
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:
SPRINT COMMUNICATIONS : Philadelphia, Pennsylvania
COMPANY L.P., et al., : February 2, 2017
Defendant : 9:06 a.m.

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TRANSCRIPT OF MORNING SESSION OF JURY TRIAL DAY 4
BEFORE THE HONORABLE JAN E. DUBOIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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14 transcription service.

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1 (The following was heard in open court at
2 9:06 a.m.)

3 THE COURT: Good morning, everybody.

4 ALL: Good morning, Your Honor.

5 THE COURT: Please be seated. We recessed
6 yesterday after having started discussions on two
7 objections, both involving exhibits. Let's address
8 the first objection that concerned the -- with the
9 document PX-174.

10 MR. FINKELSON: Your Honor, Dave Finkelson
11 for Sprint. Heeding Your Honor's instructions or
12 guidelines at the end of the day yesterday, Sprint
13 has withdrawn its objection to PX-174 so that we can
14 proceed in an orderly fashion with Dr. Akl today
15 without any delay.

16 THE COURT: All right. I can tell you when
17 I researched the question -- we were here fairly
18 late, and I don't want to keep blurting it over you,
19 but there was absolutely no basis, none, for the
20 position you took. A document produced by a party
21 opponent -- well, courts have said it differently,
22 but the Ninth Circuit said it best. I'll get it.

23 (Pause in proceedings.)

24 THE COURT: "Documents produced by a party
25 in discovery were deemed authentic when offered by a

1 party opponent," Ninth Circuit, Orr versus Bank of
2 America, 2002.

3 (Pause in proceedings.)

4 THE COURT: I don't know that Circuit Judge
5 Sneed. But in the Third Circuit, one of my
6 colleagues got it wrong and excluded a document. And
7 my good friend and classmate, now deceased, Judge
8 Becker, got it right. The case was McQueeney versus
9 Wilmington Trust Company. "We hold that
10 circumstantial evidence may, in principle, suffice to
11 authenticate a document. All that is required is a
12 foundation from which the fact finder could
13 legitimate infer that the evidence is what the
14 proponent complains it to be." My colleague kept the
15 evidence out. Chief Judge Becker said wrong.

16 For future reference, I don't -- I'm not
17 sure that all your work is in the Third Circuit. I
18 suspect you travel. But I think the general -- well,
19 the general rule is that party opponent documents
20 come in without going through an authentication
21 unless the party opponent says it's a fraud -- it's a
22 fraudulent document. And that's true with respect to
23 business records. Earlier in the trial, the argument
24 was that the requirements of Rule 803(6) were not
25 met. The objector was the party whose document was

1 at issue. I don't think that's good law and I so
2 rule. But I'm glad we've resolved the problem. I
3 wish we had resolved it yesterday. We all could have
4 gotten home a little earlier. The one advantage you
5 have over me is you have a very, very, very short
6 drive to your destination at day-in, and I don't.

7 All right, the second issue, the HLR issue.
8 Okay. We've got a few bits of deposition transcripts
9 this morning.

10 MR. GOETTLE: Yes, Your Honor. I can -- I
11 can briefly summarize --

12 THE COURT: Okay, good.

13 MR. GOETTLE: -- and I can also take you to
14 the really salient part of that deposition.

15 THE COURT: Do we still have an objection
16 to the -- we're talking about the Alcatel-Lucent
17 document.

18 MR. FINKELSON: I think, Your Honor, from
19 our perspective, it stands where it has yesterday.
20 We didn't receive from Comcast the deposition
21 testimony, the additional deposition testimony,
22 that --

23 THE COURT: You didn't?

24 MR. FINKELSON: -- they're relying on. I
25 think the particular --

1 MR. GOETTLE: I handed it to counsel this
2 morning, Your Honor.

3 THE COURT: Well, I didn't get it in
4 advance so --

5 MR. FINKELSON: I haven't -- I haven't had
6 a chance to read it, Your Honor.

7 THE COURT: Well, yesterday's deposition
8 transcript, which is summarized in the first of the
9 two exhibits, PX-172 at page 191, that part of the
10 transcript is the same. It's a little longer -- much
11 longer, but it starts in the same place. Go ahead.

12 MR. GOETTLE: So, Your Honor, Mr. Moss, who
13 is the deponent for -- I'm going to focus on PX-172.

14 THE COURT: Yes, that's where I am.

15 MR. GOETTLE: Mr. Moss, who is the
16 deponent, was the corporate representative. He was a
17 30(b)6 witness. And the document that we put in
18 front of --

19 THE COURT: 30(b)6 from Alcatel?

20 MR. GOETTLE: I'm sorry. No, from Sprint,
21 Your Honor. So let me step back and we'll --

22 THE COURT: I'm sorry. Okay. All right.

23 MR. GOETTLE: So Alcatel-Lucent was the
24 supplier. We subpoenaed them, we got the documents,
25 and then we put the documents in front of the

1 Sprint --

2 THE COURT: Okay. Got it.

3 MR. GOETTLE: -- 30(b)6 witness.

4 THE COURT: Fine.

5 MR. GOETTLE: The document, like I said,
6 was received from Alcatel in response to our
7 subpoena. It's a summary guide on how one of the
8 HLRs in Sprint's network worked. Over the course of
9 the damages period, they moved from one version of
10 Alcatel HLR to another, so this was an earlier
11 version. And the witness on -- in the transcript at
12 192 said that the document was a high level
13 explanation of BH -- SDHLR that's --

14 THE COURT: What line?

15 MR. GOETTLE: -- that's in Sprint's
16 network.

17 THE COURT: What line?

18 (Pause in proceedings.)

19 MR. GOETTLE: It is at --

20 THE COURT: I don't see that --

21 MR. GOETTLE: Where is it?

22 THE COURT: -- at page --

23 MR. GOETTLE: Oh, I'm sorry, 191, line 18,
24 question,

25 Question: "And does this relate to the

1 SDHLR that's implemented at Sprint?"

2 Answer: "This is a summary guide to the
3 SDHLR in Sprint."

4 THE COURT: All right, good.

5 MR. GOETTLE: And I guess -- I think the
6 salient part is at page -- is on page 217, going to
7 the end. It's a lot of technical speak. But what's
8 going on here, Your Honor -- it's at page 217. As I
9 mentioned yesterday, what's going on here is Mr. --
10 the witness, the 30(b)6 witness, is walking through
11 how the SDHLR in Sprint's mapping works with respect
12 to messaging.

13 Dr. Akl today is going to show the diagram
14 that there's -- that is being discussed at the
15 deposition on these pages. Dr. Akl is going to show
16 the diagram, is going to explain the diagram to the
17 jury, to show how the SDHLR maps. And next to that
18 diagram on the slide is snippets from this testimony
19 confirming Dr. Akl's understanding of
20 the -- of the diagram. So that's why we want to
21 show -- we want to show the diagram in its native
22 habitat from the document on the screen and then have
23 Dr. Akl show he looked at the diagram, he understood
24 what it meant, and he confirmed it through the
25 deposition testimony of the witness, that is

1 describing how the device works in Sprint's network.
2 That's what's shown on 217 through 222.

3 THE COURT: What part of the Moss
4 deposition do you plan to offer?

5 MR. GOETTLE: Well, Your Honor --

6 THE COURT: Or none?

7 MR. GOETTLE: None, if we get the doc --
8 none. None. This -- we're focused on the
9 admissibility of the document, and we think it is
10 admissible because it's been adopted by the employee
11 who has -- looking at the document -- granted, not
12 produced by Sprint, but looking at it and saying yes,
13 this is a high level summary of our device we have in
14 our network that we bought from Alcatel, and here's
15 how it works.

16 THE COURT: And what you want me to do is
17 rule that the document comes in?

18 MR. GOETTLE: Yes, Your Honor.

19 THE COURT: But you have to offer -- if
20 there's no agreement, you have to offer the
21 deposition.

22 MR. GOETTLE: We can -- we have it
23 designated and we can certainly play it for the jury.
24 It seems like in the need for speed for this case --

25 THE COURT: Yes, it's not --

1 MR. GOETTLE: -- but we're happy to do it.

2 THE COURT: It's not going to advance the
3 issue of speed. I seem to recall one of you focused
4 on speed at the very beginning of the trial. That's
5 very good for the Court because the Court is not
6 exactly overwhelmed by speed, but speed is
7 significant. I'm playing on your words.

8 MR. GOETTLE: Yes, Your Honor. I'm glad
9 you're playing on them that way because it sounded
10 positive.

11 THE COURT: I hope I haven't been too
12 negative.

13 MR. GOETTLE: Oh, no. I didn't mean to
14 suggest that.

15 THE COURT: At the beginning of the trial
16 and at the end of the trial, rest assured you know
17 more about the patent involved in this case than I'll
18 ever know. I'm not going to comment on your
19 collective knowledge of the rules of evidence, unless
20 you're just testing me to see if I know the rules of
21 evidence. But the bottom line, let me turn to Sprint
22 and see what Mr. Finkelson has to say on this issue.

23 MR. FINKELSON: Your Honor, thank you. Our
24 position with respect to PX-172 is that this was a
25 document produced by Alcatel-Lucent pursuant to a

1 subpoena. Comcast, for reasons that are not
2 completely clear to me, but made a decision not to
3 take the deposition of Alcatel-Lucent, which is what
4 you do when you get documents from a third party to
5 establish that they are that third party's business
6 records.

7 THE COURT: Well, they explained that, Mr.
8 Finkelson. Apparently, a prior law firm took an
9 Alcatel-Lucent deposition and there was a little
10 friction, and maybe there's no well, love lost
11 between -- or was not at the time any love lost
12 between Alcatel-Lucent and Comcast. But in any
13 event, he explained, Mr. Goettle explained, why a
14 second deposition was not taken.

15 MR. FINKELSON: And I understand that, and
16 I don't begrudge Mr. Goettle, nor Comcast for its
17 decision, but that's not an exception, Your Honor, in
18 our mind, to the rules of evidence as they apply to
19 having to establish --

20 THE COURT: No, what you have to do -- and
21 I'm sure you've read this Moss deposition. He's your
22 witness. And what you have to decide is is Moss --
23 is the Moss testimony sufficient to establish with
24 reasonable certainty that the exhibit is what Comcast
25 says it is. It's the Alcatel-Lucent -- I don't know

1 what you call the exhibit. I haven't seen it yet
2 except from a distance of 30 feet and I can't read it
3 at that distance. But the bottom line, is it what
4 Comcast says it is? And if so, can we avoid putting
5 the Moss deposition in evidence? If not, we'll have
6 to put the Moss deposition in evidence unless -- I'm
7 just thinking. No, I don't think there's a way under
8 Rule 702 -- is it 702?

9 MR. GOETTLE: I believe it's 703, Your
10 Honor.

11 THE COURT: I think you're right. Under
12 Rule 703, an expert can rely on documents that are
13 not in evidence if experts in the field regularly
14 rely on such documents. So the deposition is not
15 necessary and the document itself need not be offered
16 into evidence to get into evidence what it is I think
17 Dr. Akl is going to say about this exhibit. But
18 Comcast wants to offer the exhibit. It's Rule 703.
19 You were right.

20 MR. FINKELSON: And we don't have an
21 objection, Your Honor, to Dr. Akl relying upon it
22 under Rule 703, as distinguished from admitting the
23 document into evidence. That's always been our
24 position.

25 THE COURT: All right. Well, then what we

1 will do -- that's a choice you have to make.

2 MR. GOETTLE: Thank you, Your Honor.

3 THE COURT: The document does not come in
4 unless you read this part of the deposition or play
5 this part of the deposition. And Dr. Akl is
6 testifying by video or live? He's here?

7 MR. GOETTLE: He's here, Your Honor.

8 THE COURT: So he's not going to testify by
9 video.

10 MR. GOETTLE: No, he's not.

11 MR. FINKELSON: That would make me -- would
12 make it very difficult for me to cross-examine him
13 this afternoon.

14 MR. GOETTLE: Well, then maybe he'll play
15 by video.

16 THE COURT: If we were going to use video,
17 the idea would have been you would have done that
18 before.

19 MR. FINKELSON: I understand.

20 THE COURT: All right. Well, this ought
21 not to slow us down --

22 MR. GOETTLE: Okay.

23 THE COURT: -- very much. So we'll
24 read -- that part of the deposition has to come in.
25 That's what you want, Mr. Finkelson, is that correct?

1 MR. FINKELSON: I believe that --

2 THE COURT: I'm going to -- I'm going to
3 let the exhibit in if the -- if there's no agreement
4 provided the pertinent parts of the deposition are on
5 the record. And you could --

6 MR. FINKELSON: I understand. I
7 understand.

8 THE COURT: And that's a point that you can
9 take and --

10 MR. FINKELSON: I think Your Honor just
11 clearly stated what -- clearly stated that you're
12 going to let the document in. If that happens --

13 THE COURT: Well, because I've read it and
14 it --

15 MR. FINKELSON: And --

16 THE COURT: -- seems clear to me that Moss,
17 your witness, says yes, this is the document that we
18 use in our HLR, and it was provided by Alcatel-
19 Lucent.

20 MR. FINKELSON: And what I was just going
21 to say, Your Honor, is if that's the ruling of the
22 Court, that the document can come in that way, I am
23 not going to belabor the proceedings by asking
24 Comcast to play the deposition testimony.

25 THE COURT: All right.

1 MR. FINKELSON: I think there's a different
2 issue, Your Honor, with respect to PX-181, which is
3 the other Alcatel-Lucent document.

4 THE COURT: Oh, I haven't seen that.

5 MR. GOETTLE: That's -- Your Honor, we're
6 going to -- we're not going to -- we're not going to
7 seek to admit the document. So we'll call it right
8 here and --

9 MR. FINKELSON: I was sure I was right on
10 the rules of evidence on that one.

11 THE COURT: Do you want to check it?

12 MR. GOETTLE: There might be a reason that
13 I'm agreeing to this compromise, Your Honor.

14 MR. FINKELSON: Let the record reflect.

15 THE COURT: In other words, Comcast didn't
16 convince you and you don't think they would convince
17 me.

18 MR. GOETTLE: So, no, the other exhibit we
19 will not be offering into evidence, Your Honor.

20 THE COURT: I'm not going to -- I don't
21 think we have to touch it. And we're right on time.

22 MR. GOETTLE: Your Honor, there is
23 another -- there is another issue that I don't think
24 will derail us, but another challenge that we seek
25 the Court's guidance on.

1 THE COURT: Derailing is not --

2 MR. GOETTLE: Right.

3 THE COURT: -- going to happen in this
4 case.

5 MR. GOETTLE: Can we take that up now, Your
6 Honor?

7 THE COURT: Absolutely.

8 MR. GOETTLE: Okay, Your Honor, we're going
9 to or we would like to read into the record some
10 Sprint admissions obtained during discovery in
11 response to Comcast's request for admissions.

12 THE COURT: Okay.

13 MR. GOETTLE: And I think probably the
14 easiest way to -- the speediest way to explain the
15 issue is to hand up what I've already provided to
16 Sprint counsel, kind of a color-coded summary of what
17 we think should get read in and what we think should
18 not get read in.

19 THE COURT: These are requests for
20 admissions and responses?

21 MR. GOETTLE: They are, Your Honor.

22 THE COURT: Overall, before you hand
23 anything up, what's the issue?

24 MR. GOETTLE: The issue is that Com --
25 Sprint asked -- Comcast asked Sprint to admit, for

1 example, that Sprint's database called the SPS is a
2 core network element under Sprint's proposed
3 construction, which this Court largely adopted. And
4 the first part of the Sprint response admits that
5 it's a core network element. But the second part of
6 the response goes on with the second sentence that
7 says, "Sprint admits that it is further Sprint's
8 position that any construction of cellular network
9 that would exclude Sprint's current SMSCs and MMSCs
10 would also exclude the SPS, this database."

11 So what they're saying is under any
12 construction -- because at this time we didn't have
13 the Court's construction -- under any construction
14 that would per se exclude Sprint's messaging servers
15 would also exclude Sprint's subscriber database
16 called the SPS. That part should not be read to the
17 jury because it is contrary to the Court's
18 construction. The Court's construction does not per
19 se exclude Sprint's messaging servers. That's what
20 both parties told the jury yesterday. It's up to the
21 jury to figure that out. So the construction does
22 not exclude it per se. That sentence should not be
23 read to the jury.

24 THE COURT: You better hand it up. I'll
25 look at it and give you a chance to respond.

1 MR. FINKELSON: And Ms. Rachford, Your
2 Honor, is going to respond to the issue on behalf of
3 Sprint.

4 (Pause in proceedings.)

5 MS. RACHFORD: Good morning, Meghan
6 Rachford.

7 THE COURT: Good morning.

8 MS. RACHFORD: Sprint's position on this is
9 that to not include what Comcast has highlighted here
10 in green would be very misleading and incomplete.
11 The response does not say that if the SMSCs or MMSCs
12 are per se excluded from the construction, that the
13 SPS or LDAP would be out. What Sprint is saying here
14 is we qualified our answer. The Court had not
15 construed the term "cellular network" when we
16 responded to this RFA. It said that under what it
17 believes to be the proper construction, the SPS or
18 LDAP is part of the cellular network --

19 THE COURT: Yes, but that's not the proper
20 construction. I ruled otherwise.

21 MS. RACHFORD: Correct. And that's why
22 it's very misleading for Comcast to put in a single
23 sentence when, as our expert is going to testify in
24 this case, if the SMSCs and MMSCs are outside the
25 network, then so are the SPS and the LDAP.

1 THE COURT: Well, I don't -- my initial
2 reaction is what is underscored and parenthesized in
3 yellow is not admissible -- not admissible because
4 the proper construction of cellular network is not
5 the one to which the admission applies, and it will
6 further confuse the jury.

7 MR. GOETTLE: I'm sorry, Your Honor, I'm
8 not following.

9 THE COURT: I'm not into the yellow-green.

10 MR. GOETTLE: Yes.

11 THE COURT: I don't think the yellow part
12 of the admission is admissible.

13 MR. GOETTLE: Oh, I see, because Sprint's
14 construction was a little bit different than what the
15 Court adopted?

16 THE COURT: It's different.

17 MR. GOETTLE: Okay.

18 THE COURT: It's not the same as my
19 construction.

20 MR. GOETTLE: Okay. Understood, Your
21 Honor. And that was not an objection that Sprint was
22 raising.

23 THE COURT: Oh.

24 MR. GOETTLE: But I understand the Court's
25 position. Thank you.

1 THE COURT: So that's evidence and
2 objections that we go back to? I'm looking at Mr.
3 Finkelson. He's not smiling.

4 MR. FINKELSON: I'm happy to -- I'm happy
5 to smile and respond. Your Honor, we tried to
6 reach -- there were other -- there were other RFAs
7 that they asked us about and, frankly, we tried to
8 reach an accommodation with them so that they could
9 present what they wanted to present on other RFAs
10 with respect to the yellow.

11 THE COURT: I can sympathize with you, Mr.
12 Finkelson, and Comcast as well, when addressing
13 requests for admissions. As a lawyer, I found out
14 that that's the single most difficult thing to do, to
15 handle, in litigation. I disliked them intensely.

16 MR. FINKELSON: But we -- but we do agree
17 that the yellow portions, given the reference to the
18 proper construction, that those shouldn't be shown to
19 the jury either.

20 THE COURT: Except you didn't say that.
21 But in any event, that's my ruling. So --

22 MR. FINKELSON: Thank you.

23 THE COURT: -- the first issue is a non-
24 issue. Is there another issue? There's another.

25 MR. GOETTLE: They're the same -- they're

1 the same issue, Your Honor, so ruling on one rules on
2 both.

3 THE COURT: Okay, good.

4 MR. GOETTLE: I'm just pausing now, Your
5 Honor, because we have a listed of unobjected to RFAs
6 that we have been planning to read to the jury, and
7 maybe we need to revisit that in light of the Court's
8 guidance this morning.

9 MR. FINKELSON: We're happy to confer with
10 you on that on the break.

11 MR. GOETTLE: I don't want to read them
12 into the record and do anything to offend the Court
13 based on this morning's ruling.

14 THE COURT: To offend the Court?

15 MR. GOETTLE: Well --

16 THE COURT: No, don't worry about offending
17 the Court. Present the case as you see fit.

18 MR. GOETTLE: Okay.

19 THE COURT: I'm --

20 MR. GOETTLE: Thank you, Your Honor.

21 THE COURT: Well, I think you know the
22 rules of evidence, at least someone on your team
23 does. And if there's no problem, then you need not
24 clear it with me first.

25 MR. GOETTLE: Oh, okay.

1 THE COURT: If there's a problem, if Sprint
2 objects, then we'll address them. I think it's best
3 to address them in this fashion before call the jury
4 in. I'd prefer to keep the sidebar conferences to a
5 minimum. They're important and if we need to go to
6 sidebar, we will. But issues that we can address, as
7 we're addressing these, I'd prefer to do it the way
8 we've done it this morning.

9 MR. GOETTLE: Thank you, Your Honor.

10 MR. FINKELSON: Thank you, Your Honor.

11 THE COURT: Are we through with the --

12 MR. HANGLEY: No, there's one more matter,
13 Your Honor. Yesterday, in my rush to meet the 4:20
14 adjournment and get the witness done his direct, I
15 kind of overshot the runway on a couple of things, at
16 least maybe five or ten minutes of testimony that I
17 would like to put on on direct. Mr. Finkelson has
18 said -- suggested that I put it off to redirect,
19 but --

20 MR. FINKELSON: If it's within the scope of
21 the cross.

22 MR. HANGLEY: -- he says it's got to be, of
23 course, within the scope, and I don't know -- that's
24 in his control. I would --

25 THE COURT: I think if we were in the

1 middle of cross, that's what we would do. But since
2 we haven't begun the cross, your request is granted.

3 MR. HANGLEY: I appreciate that and I
4 apologize for --

5 THE COURT: No.

6 MR. HANGLEY: -- jumping the gun that.

7 THE COURT: No need to apologize. Very
8 little discretion involved. That's sort of a
9 no-brainer.

10 MR. HANGLEY: Thank you, Your Honor.

11 THE COURT: You may continue the direct
12 examination. Are we ready to begin?

13 MR. FINKELSON: We are, Your Honor.

14 MR. HANGLEY: I just got to go find the
15 witness.

16 THE COURT: That would be good.

17 COURTROOM DEPUTY: All of the jurors are
18 here as well.

19 THE COURT: Okay, that's good. We'll wait
20 until the witness is available.

21 (Pause in proceedings.)

22 THE COURT: We'll bring the jury in. Good
23 morning, Mr. Marcus.

24 MR. MARCUS: Good morning, Your Honor.

25 (Pause in proceedings.)

Mr. Marcus - Direct

24

1 (Jury in, 9:36 a.m.)

2 THE COURT: Good morning, everybody.

3 Please be seated. Yesterday, when we recessed Mr.
4 Hangley had reported that he finished his direct
5 examination. This morning, he requested permission
6 to ask additional questions. So instead of going to
7 cross-examination by Sprint, we'll hear additional
8 questioning from Mr. Hangley, and that will be direct
9 examination in Comcast's case. When Mr. Hangley
10 finishes Sprint will cross-examine Mr. Marcus. Mr.
11 Hangley?

12 MR. HANGLEY: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. HANGLEY:

15 Q Good morning, Mr. Marcus.

16 A Good morning.

17 Q There was testimony yesterday with respect to an
18 agreement with Verizon, what I'll call the Verizon
19 peace agreement. Do you recall when that was entered
20 into?

21 A I believe it was in September -- sometime in
22 September of 2008.

23 Q And how did that agreement come about? What led
24 to it?

25 A So I joined Comcast in it was April of 2007, and

Mr. Marcus - Direct

25

1 shortly after that, or maybe it was in the beginning
2 of 2008, Verizon approached Comcast --

3 MR. FINKELSON: Objection, Your Honor,
4 hearsay.

5 THE COURT: Do you have knowledge of the
6 Verizon approach to Comcast, personal, direct
7 knowledge?

8 THE WITNESS: I do, Your Honor.

9 THE COURT: overruled.

10 BY MR. HANGLEY:

11 Q Continue.

12 A So Verizon approached Comcast and alleged that we
13 infringed --

14 MR. FINKELSON: Objection, Your Honor,
15 hearsay. He's referring to out-of-court statements
16 made by Verizon.

17 BY MR. HANGLEY:

18 Q Same question, do you have personal knowledge of
19 this?

20 A Yes, I was in the room when they made them.

21 Q Thank you.

22 MR. FINKELSON: Your Honor, I'd ask that
23 that response be struck and the question called for
24 hearsay.

25 THE COURT: Why am I having trouble with

Mr. Marcus - Direct

26

1 this ruling?

2 MR. HANGLEY: Darned if I know. It sounds
3 to me --

4 MR. FINKELSON: Your Honor, the witness is
5 referring to --

6 THE COURT: Maybe we ought to go to
7 sidebar.

8 (Sidebar discussion as follows.)

9 MR. HANGLEY: Your Honor, know what, Your
10 Honor, why don't I just move on to the next question.

11 THE COURT: No, I'm going --

12 MR. HANGLEY: Okay.

13 THE COURT: -- to rule (indiscernible).

14 (Pause in proceedings.)

15 MR. HANGLEY: I don't understand the
16 objection. He said he was in the room when the
17 statements were made.

18 MR. FINKELSON: If it was made by Sprint,
19 it's an admission, but it's made by Verizon.

20 MR. HANGLEY: Pardon me?

21 THE COURT: Well, how can Comcast get into
22 the record an approach by Verizon stating that we
23 think you're infringing, is what he's trying to do.

24 MR. HANGLEY: How can we get it into the
25 record?

Mr. Marcus - Direct

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1 THE COURT: No, without --

2 MR. HANGLEY: Without -- if that went to
3 the truth of anything that was hearsay, that was
4 excludable, it would be that we're infringing.
5 That's the truth that's unreliable for. And, in
6 fact, nobody is arguing that out of this witness.
7 He's simply saying our state of mind --

8 THE COURT: All right. If your -- if it's
9 offered -- and I'm trying to think whether it could
10 be offered not to establish the truth, but only to
11 establish that it was said.

12 MR. HANGLEY: Of course. The last thing we
13 want to do is --

14 THE COURT: Establish --

15 MR. HANGLEY: -- establish the truth of
16 what -- of what they were accusing us of.

17 MR. FINKELSON: The truth --

18 MR. HANGLEY: That's the last thing I want
19 to do.

20 MR. FINKELSON: The statement is
21 (indiscernible) to bring in the statement is for the
22 truth of the matter asserted, which is we allege
23 (indiscernible).

24 MR. HANGLEY: That's (indiscernible).

25 MR. FINKELSON: It's not for his state of

Mr. Marcus - Direct

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1 mind. It's (indiscernible) statement by a third
2 party for which there is no exception to the hearsay
3 rule. (Indiscernible).

4 MR. HANGLEY: The truth of the matter
5 that -- the truth of the fact that Verizon said it,
6 that's not hearsay. He was there.

7 THE COURT: Goettle is smiling. He thinks
8 you finally stumped me on an evidentiary question.

9 MR. GOETTLE: No, not at all, Your Honor.

10 THE COURT: I think it comes in. Not --
11 and I'll explain to the jury it doesn't come in to
12 establish the truth of the statement, but only that
13 there was --

14 MR. HANGLEY: You mean it doesn't come in
15 to establish the truth of the accusation?

16 THE COURT: Yes.

17 MR. HANGLEY: I hope you'll use that word
18 because that will make it clear.

19 (Sidebar discussion concludes.)

20 THE COURT: Ladies and gentlemen, this is
21 an objection based on hearsay that we went to sidebar
22 to address. There's an exception to the hearsay rule
23 if a statement is offered not to establish the truth
24 of what was said. And in this case it -- the answer
25 about Verizon approaching Comcast and stating you've

Mr. Marcus - Direct

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1 infringed our patents is offered only to show that it
2 was said -- it was said to this witness, and not to
3 establish the truth of the allegation. So this
4 witness' state of mind is that according to Verizon,
5 we are -- we, Comcast, are infringing a Verizon
6 patent or Verizon patents. Does that address the
7 issue?

8 MR. HANGLEY: Yes, it does, Your Honor.

9 THE COURT: All right.

10 MR. HANGLEY: Thank you very much.

11 THE COURT: And now -- I don't think the
12 question has been answered.

13 BY MR. HANGLEY:

14 Q How do you know that they made that statement?

15 A I was in the room when they made the statement.

16 Q Okay. And just to be clear, to follow up on what
17 the Judge said, you're not saying that they were
18 right in making such an accusation?

19 A No, we believe they were wrong.

20 Q Okay. Thank you. Now, how did you arrive at
21 peace?

22 A So after a series of negotiations and meetings
23 with Verizon, we eventually entered into -- we came
24 up with an arrangement by which we could resolve the
25 allegations, and that's the September 2008 agreement.

Mr. Marcus - Direct

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1 Q Okay. Now, you -- let me ask you a question
2 about your relations with AT&T. We've heard Mr.
3 Finnegan's testimony that AT&T was an aggressor. Was
4 that correct at some point?

5 MR. FINKELSON: Objection, Your Honor.
6 Your Honor, may we approach at sidebar with respect
7 to that question?

8 MR. HANGLEY: I'm not going to be using any
9 documents, Your Honor.

10 THE COURT: Apparently, there's an --

11 MR. FINKELSON: I believe it's getting into
12 issues that Your Honor has -- or perhaps getting into
13 issues that Your Honor has already decided with
14 respect to --

15 THE COURT: That contract is out of the
16 case.

17 MR. HANGLEY: And I'm not asking about a
18 contract.

19 THE COURT: All right. Well, thanks for
20 alerting me, Mr. Finkelson, and maybe we'll have to
21 address an objection, but that objection is
22 overruled.

23 MR. FINKELSON: Thank you, Your Honor,
24 understood.

25 THE COURT: You have to repeat the

Mr. Marcus - Direct

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1 question.

2 BY MR. HANGLEY:

3 Q Was AT&T also an aggressor at one point?

4 A It was, yes.

5 Q Now, there is not now any agreement, written
6 agreement, between Comcast and AT&T that is still
7 within its contractual term, is that correct?

8 A That is correct.

9 Q Okay. Is AT&T still an aggressor?

10 A We consider it still to be a potential aggressor,
11 yes.

12 Q Okay. And have there been any further saber-
13 rattlings by AT&T in recent times?

14 A Not since our last interaction with them, no.
15 And I -- you know what I would say is the reason I
16 think they have not come back is because of our
17 acquisition strategy in that we now have a very large
18 patent portfolio.

19 Q Okay. And how are you using that portfolio? Are
20 you going out and selling to people?

21 A No, we've never affirmatively approached any
22 other company or person, and we've never -- for
23 licensing, and we've never in the first instance sued
24 anybody for patent infringement.

25 Q Does Comcast have a policy in that regard?

Mr. Marcus - Direct

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1 A When I hear policy I think of a written document
2 and --

3 Q No.

4 A -- so I would say there's no written document,
5 but our policy or practice is that it's -- these are
6 defensive assets.

7 Q Okay. And I'd like to talk to you just briefly
8 about the chronology of some things that I think
9 we've already talked about. The agreement with Nokia
10 as to the price of the acquisition of the patents,
11 when was that?

12 A So the effective date was June 30th, 2010.

13 Q That's of the documented deal, correct?

14 A Yes.

15 Q Okay. How about when you got word from your
16 colleagues that they had agreed to the price of the
17 purchase? Do you recall?

18 A Well, it had to be before that. I don't remember
19 the exact date that they agreed on the price, but,
20 you know -- but when we signed the agreement,
21 obviously, we had agreed on it. So it happened
22 before that.

23 Q Okay. And then you signed the patent purchase
24 agreement on June 30?

25 A June 30th, 2010.

Mr. Marcus - Direct

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1 Q Okay. And by that time, had Sprint already begun
2 what I call saber-rattling about its patents?

3 A Yeah, I believe I testified yesterday the very
4 first time they approached us was January 21st, 2010.

5 Q Okay. And they did sue you in Kansas, didn't
6 they?

7 A They did, yes, subsequently.

8 Q Okay. And when was that?

9 A December of 2011 I believe.

10 Q Was that suit based on these claims by Sprint
11 that you were -- that Comcast was infringing its
12 patents?

13 A I don't know. I'd assume so.

14 Q Okay. And did you countersue at any point?

15 A Yes, we did. This was one of those lawsuits and
16 it was filed in January or February of 2011, a couple
17 months later.

18 THE COURT: 2011?

19 THE WITNESS: I'm sorry.

20 MR. HANGLEY: 2012.

21 THE WITNESS: 2012, sorry, Your Honor.

22 BY MR. HANGLEY:

23 Q Now, you heard Mr. -- you were here for opening
24 statements yesterday I believe?

25 A I was, yes.

Mr. Marcus - Cross

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1 Q Okay. Mr. Finkelson began his remarks telling
2 this jury that this was all part of a plan, this
3 lawsuit is part of a plan, to enter the cellular
4 market. Did you hear that statement?

5 A I did.

6 Q How much truth is in it?

7 A None.

8 MR. HANGLEY: No further questions.

9 THE COURT: Mr. Finkelson, you may begin
10 your cross-examination.

11 MR. FINKELSON: Thank you, Your Honor.

12 (Pause in proceedings.)

13 CROSS-EXAMINATION

14 BY MR. FINKELSON:

15 Q Good morning, Mr. Marcus. How are you?

16 A I'm doing good. We'll see how I'm doing in a
17 while.

18 Q I think you'll do just fine. Now, Mr. Hangley
19 was just asking you questions, Mr. Marcus, with
20 respect to an agreement between Comcast and Verizon,
21 is that right?

22 A Yes.

23 Q And you agree that Verizon paid no money to
24 Comcast to license any Comcast patents under that
25 agreement, right?

Mr. Marcus - Cross

35

1 A Yes, neither party paid any money for the patent.

2 Q And the agreement with Verizon was in 2008,
3 correct?

4 A Yes, that's when we signed it, yeah.

5 Q And that was two years before Comcast bought the
6 870 patent that has us here today, correct?

7 A Yeah, approximately.

8 Q Now, you testified yesterday, Mr. Marcus, about
9 an invention disclosure document that Comcast
10 required Nokia to provide to you as part of the
11 closing of the 870 patent purchase agreement. Do you
12 recall that testimony?

13 A Yeah. What I think I said was they were obliged
14 to give it to us if they had it.

15 Q In fact, that's what the contract said, correct?

16 A Yeah.

17 Q Okay.

18 A Yes.

19 Q And I couldn't help but notice that you weren't
20 asked to show that Nokia invention disclosure
21 statement to the jury yesterday, so I'd like you to
22 take a look at it today, if you would, please.

23 MR. FINKELSON: Your Honor, may I approach
24 with a copy of DX-150?

25 THE COURT: You may.

Mr. Marcus - Cross

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1 MR. HANGLEY: Objection. Objection, before
2 it's shown --

3 THE COURT: What --

4 MR. HANGLEY: -- to the jury. It's
5 hearsay.

6 THE COURT: Let me see a hard copy of it.

7 (Pause in proceedings.)

8 MR. HANGLEY: There is also a relevancy and
9 authenticity objection, Your Honor.

10 MR. FINKELSON: Your Honor, Comcast raised
11 this exact document with the witness during its
12 direct examination, but did not show it to him.

13 THE COURT: Let's go to sidebar.

14 (Pause in proceedings.)

15 THE COURT: Ladies and gentlemen, if you
16 wish to stand and stretch, you may do so. I really
17 hadn't planned to send this much time at sidebar, so
18 take advantage of it. You can't hear -- all right?

19 (Sidebar discussion as follows.)

20 MR. FINKELSON: Your Honor, this was a
21 document that we previously raised with the Court
22 during the pretrial motion proceedings. Your Honor
23 took it under advisement. And Mr. Hangle
24 specifically asked the witness about this document
25 during direct examination.

Mr. Marcus - Cross

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1 THE COURT: I took --

2 MR. FINKELSON: You took the issue under
3 advisement.

4 THE COURT: Can you get me a copy?

5 MR. FINKELSON: Comcast had raised a
6 hearsay objection to the document, and we had argued
7 that we weren't offering it for the truth of the
8 matter asserted. And Your Honor did not rule. You
9 heard argument on it and said you either took it
10 under advisement or you said we deal with it in the
11 ordinary course, I think is actually what you said.
12 This is --

13 THE COURT: Now, I -- so I -- it was raised
14 as an issue, but I never ruled on it?

15 MR. FINKELSON: Correct, you stated that
16 you would deal with it in the ordinary course of the
17 trial.

18 THE COURT: In what context did it -- was
19 it raised?

20 MR. FINKELSON: It was raised because it
21 was one of the hearsay objections that we brought to
22 Your Honor's attention in the course of identifying
23 ones that would be helpful to resolve before the
24 trial. So this is the (indiscernible) put forth
25 because Nokia used it for contracts --

Mr. Marcus - Cross

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1 THE COURT: It's referred to in -- and it's
2 referred to in the purchase agreements.

3 MR. FINKELSON: Right. And Comcast
4 produced it to us in this litigation out of its
5 files, and if I may borrow Mr. Hangley's words about
6 the truth of the matter asserted a moment ago, this
7 is -- this goes, from our perspective, in that bucket
8 and --

9 THE COURT: Oh, no, this is -- this is one
10 that I think is easy. A document that is in your
11 file is not an admission if the document was not
12 written by you. This is a document -- the agreement
13 said -- as Mr. Marcus just testified, the agreement
14 said after signing, you will send us within 30 days a
15 variety of documents if you have them. Okay?
16 These -- this is in the bucket of documents that we
17 received from Nokia and those aren't in our files.

18 MR. FINKELSON: But you mentioned this --
19 this was mentioned in his (indiscernible).

20 THE COURT: And I'm -- and he can say we
21 received this document -- he identified -- I forget,
22 did he refer to the particular document? I don't
23 recall whether he did or not, actually.

24 MR. RIOPELLE: Oh, I think -- he said the
25 admission disclosure.

Mr. Marcus - Cross

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1 MR. FINKELSON: He said admission
2 disclosure.

3 THE COURT: Okay.

4 MR. FINKELSON: And, again --

5 THE COURT: Okay.

6 MR. FINKELSON: -- this was contractually
7 required. And not only can we say that this is the
8 document, he can speak to the portions of the
9 document, including portions that I think are behind
10 Comcast's objection, which are the portions on the
11 very last page of the document where there is a
12 provision of the document that talks about value of
13 the 870 patent, and which we presented to Your Honor
14 previously. We think that evidence comes in because
15 it doesn't go to the truth of the matter.

16 (Indiscernible) we're not using it to show that is
17 the actual value. We're using it to show that that
18 would have been -- this document and this information
19 would have been on Nokia's mind when it came to the
20 hypothetical negotiation with Sprint. We're not
21 offering it for the truth of the matter asserted. We
22 also argued to Your Honor previously --

23 THE COURT: The last page of the document?

24 MR. FINKELSON: Yes. Right here, Your
25 Honor, there's a section called the value

Mr. Marcus - Cross

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1 (indiscernible). This was where Nokia indicated that
2 the invention had a modest value. And I think that's
3 what's behind Comcast's objection. Again, we're not
4 offering it for the truth of that statement. We are
5 offering it to show that information would have been
6 on Nokia's mind. In fact, under the hypothetical
7 negotiation rules, it would have been one of the --

8 MR. HANGLEY: Is this everybody's table?
9 I'm trying to (indiscernible). No, go ahead.

10 MR. FINKELSON: (Indiscernible) had this
11 information at its disposal. So, therefore, it's not
12 hearsay. We also argued (indiscernible) -- that
13 Comcast adopted because it had requested a document
14 and received it. And I believe Your Honor's comments
15 are something along the lines of you're on better
16 footing on option one than you are on the party
17 admission, or something along those lines.

18 MR. HANGLEY: But not much.

19 THE COURT: It's not a party admission.

20 MR. HANGLEY: It's not a party admission.
21 It is probably with respect to this page, which says
22 "To be completed by a manager," okay? We don't know
23 who that manager was. We don't know whether or
24 not -- you will remember that Sprint tried to depose
25 belatedly --

Mr. Marcus - Cross

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1 THE COURT: I understand.

2 MR. HANGLEY: -- Nokia to authenticate that.

3 THE COURT: You don't have to remind me.

4 And there were -- there were no depositions.

5 MR. HANGLEY: There were not depositions.

6 And this document tells you what some unknown person

7 said with respect --

8 THE COURT: At Nokia --

9 MR. HANGLEY: At Nokia.

10 MR. FINKELSON: It's the manager.

11 MR. HANGLEY: It's not --

12 MR. FINKELSON: It's the manager, Your

13 Honor, and (indiscernible) --

14 THE COURT: All right.

15 MR. HANGLEY: No, we (indiscernible).

16 MR. FINKELSON: -- (indiscernible) of the
17 truth.

18 THE COURT: I'm going to allow the document
19 and I'll give a limiting instruction stating that
20 it's not offered to establish the truth of what it
21 said, but only to show that it was in Nokia's state
22 of mind and it was to be considered as part of the
23 hypothetical negotiation (indiscernible).

24 MR. FINKELSON: Thank you, Your Honor.

25 MR. HANGLEY: Your Honor, it's the state of

Mr. Marcus - Cross

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1 mind of an unknown individual at Nokia.

2 THE COURT: It's part of the contract --
3 the documents, that were provided pursuant to the
4 contract.

5 MR. HANGLEY: It's a document that was
6 provided with what we call the document dump. After
7 signing, we take the files. We got them. That's
8 what it is. It was not relied on by anyone --

9 THE COURT: Well --

10 MR. HANGLEY: -- in negotiating the
11 transaction.

12 THE COURT: -- you don't know that.

13 MR. HANGLEY: No, we don't know that. And
14 that's why it's not evidence.

15 THE COURT: Except it was -- it's evidence
16 of what Nokia was thinking.

17 MR. HANGLEY: Not at the time of any
18 transaction.

19 THE COURT: It's part of the -- it's part
20 of it. The documents were provided -- I don't know
21 that there's a --

22 MR. HANGLEY: There's a date.

23 THE COURT: I don't see a date.

24 MR. FINKELSON: It's 1999.

25 MR. HANGLEY: It's '99.

Mr. Marcus - Cross

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1 MR. FINKELSON: And the documents in
2 (indiscernible) --

3 MR. HANGLEY: In other words, it's 11 years
4 before.

5 MR. FINKELSON: He's already testified --

6 THE COURT: All right. The document comes
7 in.

8 MR. FINKELSON: Thank you, Your Honor.

9 MR. HANGLEY: Very well, Your Honor.

10 (Sidebar discussion concludes.)

11 THE COURT: We have another --

12 MR. HANGLEY: Your Honor, it's not going to
13 be admitted. It's --

14 THE COURT: What?

15 MR. HANGLEY: It's not going to be
16 admitted. They're on cross.

17 THE COURT: Yes. There was a hearsay
18 objection to something that was noted in a document.
19 As with the prior objection, the one I just
20 addressed, this question and answer, and there might
21 be more than one, but the questions relating to this
22 document, and in particular, the answers, are not
23 offered to establish the truth of what was said.
24 They're offered only to show -- and this is a Nokia
25 document. They're offered only to show that this

Mr. Marcus - Cross

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1 was, among other things, what Nokia was thinking.
2 Not offered to prove it, offered to show that it was
3 in their favor. And this relates to the hypothetical
4 negotiation -- remember, that's a damages issue -- in
5 2005 -- '05?

6 MR. FINKELSON: 2005, that's correct, Your
7 Honor.

8 THE COURT: -- between Nokia, as the then
9 owner of the patent, and Sprint, as the alleged
10 infringer. That's the way you start on the damages
11 calculation, the negotiations in 2005. And this
12 issue that we're going to hear about is related to
13 Nokia's thinking at that time, but still for you to
14 decide whether to believe it or not to believe it.
15 Your call. You may proceed.

16 MR. FINKELSON: Thank you, Your Honor.

17 (Pause in proceedings.)

18 BY MR. FINKELSON:

19 Q Mr. Marcus, you have --

20 MR. RIOPELLE: Is it on their screens?

21 MR. FINKELSON: I believe it is.

22 (Pause in proceedings.)

23 BY MR. FINKELSON:

24 Q Mr. Marcus, you have what has been marked as
25 DX-150 in front of you, correct?

Mr. Marcus - Cross

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1 A I do, yes.

2 Q And you've seen it before, right?

3 A Well, give me a chance to look at it.

4 Q Sure.

5 A I guess I should have brought my glasses, but --

6 Q Do you need --

7 A No, I'm all right.

8 Q -- us to retrieve them?

9 A I'll just hold it out a little bit.

10 (Pause in proceedings.)

11 A So yeah, I think I've seen this document before.

12 Q And you see "Nokia" at the top left-hand corner
13 of the page?

14 A Yes, uh-huh.

15 Q And you see how it's entitled "Invention Report?"

16 A Yes, I do.

17 Q And you know that DX-150 is the invention report
18 for the 870 patent, correct?

19 A So the way I would describe it is it's what I
20 understand to be the invention disclosure report for
21 a -- for some inventions, one of which ended up
22 becoming the 870 patent.

23 Q So it's the invention report for an invention
24 that ended up becoming the 870 patent, correct?

25 A Yeah, one of them. There was a -- there was more

Mr. Marcus - Cross

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1 than one invention disclosed in it, as I recall, and
2 so there was a whole separate family of patents that
3 came off of it.

4 Q And you reviewed this invention report for the
5 870 patent when you received it from Nokia, correct,
6 Mr. Marcus?

7 A Yes, they sent a CD with documents on it and I
8 believe this was one of them, and I reviewed it.

9 Q Can you please turn to the last page of DX-150?

10 MR. FINKELSON: And, Mr. Baird --

11 THE COURT: Before you do, Mr. Marcus, did
12 this report apply only to the 870 patent or did it
13 apply to all of the patents that were acquired in
14 2010 by Comcast from Nokia?

15 THE WITNESS: So it didn't apply to any of
16 the -- well, it -- there were three families of -- I
17 believe there were three -- three families of patents
18 that we acquired in the June 2010 acquisition and,
19 you know, there was one U.S. patent in each one of
20 those, and this applied to the 870 patent family. It
21 also applied --

22 THE COURT: What do you mean by "patent
23 family?" Are you talking about the three U.S.
24 patents?

25 THE WITNESS: No.

Mr. Marcus - Cross

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1 THE COURT: Is that the family?

2 THE WITNESS: No. So what happened was
3 originally -- what typically happens is you file a
4 first application and that might be -- you know, in
5 the U.S. for a U.S. inventor. Here, it was in
6 Finland. And then what they do is they -- if they
7 want to pursue patent -- patents in the rest of the
8 world, in other places, they will then go file patent
9 applications in other places, and that's what they
10 call a family. So you'll have maybe a Finish patent
11 and a U.S. patent, and a European patent, and
12 that's -- they're all relating or covering the same
13 invention. They have a family of patents.

14 THE COURT: What -- are you saying that
15 this document, DX-150, refers to the 870 patent
16 family, as you've described it?

17 THE WITNESS: Yes, and one other that was
18 not part of our acquisition.

19 THE COURT: All right.

20 MR. FINKELSON: Thank you, Your Honor. Mr.
21 Baird, if you'll put the last page of DX-150 on the
22 screen?

23 BY MR. FINKELSON:

24 Q And if you'll turn to that, Mr. Marcus?

25 A Okay.

Mr. Marcus - Cross

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1 Q And do you see on the last page of DX-150 a
2 section entitled "Value of the Invention?"

3 A I do.

4 Q And do you see where the number two is circled,
5 sir?

6 A I do.

7 Q And that's two on a scale of zero to five,
8 correct, Mr. Marcus?

9 A Yeah. It says, "Describe the strategic
10 importance to Nokia by rating it zero to five," and
11 this is -- says at the top, "To be completed by the
12 manager."

13 Q Zero being the lowest, five being the highest,
14 correct, Mr. Marcus?

15 A It says, "Strategic Importance, zero equals none
16 and five equals key strategic value, reads on the
17 standard specification."

18 Q So zero being the lowest, five being the highest,
19 correct?

20 A Right, but you need to define what it's talking
21 about.

22 Q Number two is circled and it says next to it,
23 does it not, Mr. Marcus, "Modest, easy to design
24 around or modest potential for standard
25 specification," is that right?

Mr. Marcus - Cross

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1 A Yep, that's what it says.

2 Q You can put that exhibit to the side, sir.

3 A I guess I would also --

4 Q Now, you made reference -- you made --

5 A I would also point out that --

6 Q And you can raise that, Mr. Marcus. My question
7 was finished and I --

8 THE COURT: Well, the question might have
9 been finished. Have you finished your answer, Mr,
10 Marcus?

11 THE WITNESS: Not really.

12 THE COURT: Well, then you can finish your
13 answer.

14 THE WITNESS: Okay. So I -- this is -- you
15 know, when it's talking value of the invention, you
16 know, all of these ratings are relative to whether or
17 not it's going to be in a standard. That's the way I
18 read these. And at the time that's what this person
19 thought, so -- apparently.

20 BY MR. FINKELSON:

21 Q And that person circled it as a two, as modest,
22 correct, Mr. Marcus?

23 A That's what it says, yes.

24 Q With the hammer sound effects too.

25 THE COURT: I have to apologize.

Mr. Marcus - Cross

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1 Apparently, they're doing some construction.

2 MR. FINKELSON: I just didn't want Mr.
3 Marcus to think I had brought in the hammers to
4 assist my examination.

5 BY MR. FINKELSON:

6 Q Now, you made reference yesterday and again
7 today, Mr. Marcus, to a lawsuit that was brought by
8 Sprint against Comcast in 2011, right?

9 A Yes.

10 Q And you're familiar with that lawsuit, aren't
11 you, sir?

12 A I am.

13 Q And you know that the patents that Sprint has
14 asserted against Comcast in that lawsuit were
15 invented by Sprint employees, right?

16 A That's what I understand, yeah.

17 Q And Sprint didn't -- you understand that Sprint
18 didn't buy those patents from somebody else, correct?

19 A That's my understanding, yeah.

20 Q Now, you also talked a lot yesterday, Mr. Marcus,
21 about re-examination and ex parte re-examination. Do
22 you recall that testimony, sir?

23 A I do.

24 MR. FINKELSON: Mr. Baird, can you pull up
25 the first page of PX-4? Your Honor, PX-4 has already

Mr. Marcus - Cross

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1 been admitted. That page, thanks.

2 (Pause in proceedings.)

3 MR. FINKELSON: PX-4, Your Honor, has
4 already been admitted into evidence through Comcast's
5 omnibus motion.

6 THE COURT: Did that motion serve to admit
7 all of those exhibits? I didn't go back and read the
8 order. I have it.

9 MR. FINKELSON: I think you asked if
10 Comcast ultimately then moved to do it, which I
11 believe that they did at the end of the day
12 yesterday.

13 THE COURT: Well, if we can speed it up
14 that way, that's great.

15 MR. FINKELSON: We're happy to do that.

16 THE COURT: All right, then all of the
17 documents in the -- listed in the amended Comcast
18 motion are deemed received into evidence. I'm not
19 going to go over the list now.

20 MR. FINKELSON: Thank you, Your Honor.

21 BY MR. FINKELSON:

22 Q Do you see what has been marked as PX-4 on your
23 screen, Mr. Marcus?

24 A I mean I see something. I see something on the
25 screen.

Mr. Marcus - Cross

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1 Q Can you tell --

2 A It doesn't say PX-4, but I --

3 Q Well, let me go ahead and --

4 A Oh, okay. There you go. All right.

5 Q Do you recognize what PX-4 is, Mr. Marcus?

6 (Pause in proceedings.)

7 Q And let me do this. It's not a memory test, so
8 let me come and --

9 MR. FINKELSON: If I may approach, Your
10 Honor --

11 THE COURT: You may.

12 MR. FINKELSON: -- and hand the witness --

13 THE COURT: You may.

14 THE WITNESS: Yeah, I think I know what it
15 is. It's -- I think it's the back and forth -- it's
16 the file history of the re-examination. It's like
17 the cover page. When you ask them for a copy of it
18 they typically put something like that on it.

19 MR. FINKELSON: Thank you. Here's a copy
20 of it, sir.

21 THE WITNESS: Okay.

22 MR. FINKELSON: (Indiscernible).

23 (Pause in proceedings.)

24 BY MR. FINKELSON:

25 Q I didn't want you getting out of here without any

Mr. Marcus - Cross

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1 luggage today, Mr. Marcus, so there you go. This is
2 a copy of the ex parte re-examination file for the
3 870 patent, correct, Mr. Marcus?

4 A You know, it's obviously a very large stack of
5 documents. Based on the coversheet, that's what it
6 appears to be, so --

7 Q And what the re-examination file is, that's the
8 official record of the Patent Office of what happened
9 at the re-examination of the 870 patent, right?

10 A Again, that's -- it's all available to the
11 public, yeah.

12 Q Is that your understanding of what this is, sir?

13 A That's my understanding of what it is, yeah.

14 Q And if you could turn to page PX-4. And it's up
15 on your screen, Mr. Marcus, if it's easier to refer
16 to that way.

17 A So it's page four of PX-4, sir?

18 Q Yes, sir.

19 A Okay. All right.

20 Q Do you have that?

21 A I do, yep.

22 Q And on that page, sir, at the bottom of the page,
23 do you recognize that as your signature?

24 A Yes, that is, unfortunately, my signature, yeah.

25 Q The jury saw how I drew yesterday. So now they

1 see how you sign and we're even.

2 A It's not the best writing, but yeah, that's my
3 signature.

4 Q And, in fact, you supervised the re-examination
5 proceeding for the 870 patent on behalf of Comcast,
6 right?

7 A I did, yes.

8 Q And in the re-examination, claim one of the 870
9 patent -- I believe you alluded to this yesterday --
10 it was amended only to correct minor, obvious
11 informalities, right?

12 A That's right, yeah.

13 Q And in the re-examination, Comcast also told the
14 Patent Office that new claim 112 includes all the
15 features of original claim one of the 870 patent,
16 correct?

17 A That I don't remember.

18 Q And --

19 A Yeah, I'd have to look at that to --

20 Q Sure. I'm happy to refer you to an exact page
21 from PX-4 if that will help you. If you'll turn to
22 page 1612, Mr. Marcus? It's also on your screen.

23 A Yeah, maybe I'll look at it there.

24 (Pause in proceedings.)

25 A Okay. So at the very bottom, is that what you're

Mr. Marcus - Cross

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1 referring to?

2 Q Yes, sir.

3 A So, "New independent claim 112 includes the
4 features of claim one, and is thus, allowable for the
5 same reason to claim one. Claim 112 further recites
6 that the mapping" --

7 Q And you -- you're welcome to keep reading if you
8 want, but it was the first sentence that I was
9 focused on.

10 A Okay. I wouldn't mind seeing the rest of it, if
11 you don't mind --

12 Q Sure.

13 A -- just so I know what it says.

14 MR. FINKELSON: Can we turn to the next
15 page?

16 (Pause in proceedings.)

17 THE WITNESS: Okay. Yeah.

18 BY MR. FINKELSON:

19 Q Do you see how in this document it says that
20 Comcast told the Patent Office that new claim 112
21 includes all the features of original claim one of
22 the 870 patent, and then goes on to provide the
23 additional information that you just read?

24 A Yeah, I see what it says.

25 Q And in the re-examination, the Patent Office also

Mr. Marcus - Cross

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1 found new claim 113 was narrower than every original
2 independent claim, is that right, sir?

3 A I don't know.

4 Q Can you turn to page 1633 -- or better yet, look
5 on your screen at page 1633 of the exhibit? And look
6 at the bottom section, sir. Do you see where it
7 says, "Furthermore" --

8 MR. HANGLEY: Can you allow him to get to
9 that, please?

10 BY MR. FINKELSON:

11 Q Do you see where it says, sir, that,
12 "Furthermore, newly added claims 20" --

13 MR. FINKELSON: Do you have it?

14 MR. HANGLEY: I do, thank you.

15 MR. FINKELSON: I thought you were asking
16 the witness.

17 BY MR. FINKELSON:

18 Q "Furthermore, newly added claims 20 through 113
19 are narrower than every original independent claim."
20 Do you see that, sir?

21 A Yeah, I see that. Yep.

22 Q And that's a statement by the patent examiner,
23 correct, sir?

24 A Yeah, as I -- I mean this is -- because it's in
25 the examiner's reasons for patentability, so --

Mr. Marcus - Cross

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1 Q Now, was Sprint a participant in the 870
2 re-examination, 870 patent re-examination, Mr.
3 Marcus?

4 A Not to my knowledge.

5 Q It was just Comcast and the Patent Office, right?

6 A As far as I'm aware, yeah. So --

7 Q And isn't it true, Mr. Marcus that nobody at
8 Comcast ever spoke with the inventor of the 870
9 patent regarding the re-examination proceeding?

10 A I believe that's correct. We never spoke to the
11 inventor as part of the re-exam, yep.

12 Q Now, you would agree, Mr. Marcus, wouldn't you,
13 that the ex parte re-examination process is very much
14 tilted in favor of the patent owner?

15 A I would not agree with that.

16 Q You would not agree with that? Mr. Marcus, in
17 2015, you participated in a panel in the Patent
18 Office proceedings in Washington, D.C. hosted by the
19 Duke Law Center for Innovation Policy?

20 A Yep.

21 Q You remember that, right, sir?

22 A I do.

23 MR. FINKELSON: Your Honor, I'd like to
24 play the videotape of what Mr. Marcus had to say
25 about the ex parte re-examination process when he

Mr. Marcus - Redirect

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1 spoke on that panel, if I may.

2 (Videotape is being played at this time.)

3 BY MR. FINKELSON:

4 Q Mr. Marcus, Comcast put the 870 patent through ex
5 parte re-examination, correct?

6 A We did.

7 MR. FINKELSON: I have no further
8 questions, Your Honor.

9 THE COURT: I gather you have some
10 redirect, Mr. Hangle?

11 MR. HANGLEY: I do.

12 THE COURT: You may proceed.

13 REDIRECT EXAMINATION

14 BY MR. HANGLEY:

15 Q With respect to the -- first things first, this
16 document --

17 MR. HANGLEY: Could we put the first page
18 of DX-150 on the screen, please?

19 (Pause in proceedings.)

20 BY MR. HANGLEY:

21 Q Now, first of all, I see that this is a form
22 completed by a manager, is that -- is that correct?
23 I'm looking at the coversheet. Can you read the name
24 of the manager? It's in -- it's in the box that
25 says, "Completed by the manager," and maybe we can

Mr. Marcus - Redirect

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1 blow that up. Is that somebody named Markiev Niemi
2 (ph)?

3 A Yeah, to the best I can -- it's Markiev Niemi or
4 Neil.

5 Q Okay.

6 A Something like that.

7 Q Okay. And --

8 A It's in Finish I'm presuming.

9 Q Okay. Now, that person was not the inventor, is
10 that correct, so far as you can tell from the form?

11 MR. FINKELSON: Objection, Your Honor,
12 leading.

13 BY MR. HANGLEY:

14 Q Can you tell from the form whether that person
15 was the inventor?

16 A Yeah, that's not the inventor. The inventor was
17 Huti Aho (ph).

18 Q Okay. Okay.

19 MR. HANGLEY: Now, let's go to that back
20 page, please, and blow up block two.

21 (Pause in proceedings.)

22 MR. HANGLEY: Can we do that?

23 MR. DYER: The last page? What page did
24 you say?

25 MR. HANGLEY: The last page. And blow up

Mr. Marcus - Redirect

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1 the area that's called "Value of the Invention."

2 (Pause in proceedings.)

3 MR. HANGLEY: And, actually, if we could
4 blow up one to begin with.

5 BY MR. HANGLEY:

6 Q Now, this invention that they were talking about,
7 do you know -- you've testified that there were
8 actually two different inventions involved here,
9 discussed in this form?

10 A Yes, that was my understanding.

11 Q Okay. Now, in block one it says, "Is this
12 invention going to be used by Nokia," and this
13 manager, not the inventor, checked in "Possibly?"

14 MR. FINKELSON: Objection, Your Honor, Mr.
15 Hangley is leading the witness.

16 MR. HANGLEY: I'm reading from a form, Your
17 Honor. Okay. Let's do it this way.

18 THE COURT: Ask the witness to say it.

19 MR. HANGLEY: Pardon me?

20 THE COURT: The form has been used by
21 Sprint, so ask the witness, instead of leading the
22 witness.

23 MR. HANGLEY: Thank you, Your Honor.

24 BY MR. HANGLEY:

25 Q What does -- what does the invention -- what does

1 the form say in block one with respect to the
2 possibility that Nokia will ever have a use for the
3 invention?

4 A Well, it has a question that says, "Is this
5 invention going to be used by Nokia," and whoever
6 filled this out, presumably, the manager, checked
7 "Possible."

8 Q Okay. Can you tell from this which invention he
9 was talking about?

10 A No.

11 Q Okay. And then he says "Development Status of
12 the Invention." Do you see that next block down and
13 the next question?

14 A I do.

15 Q And what is the response by the manager?

16 A It says that that status of the invention is that
17 it is being developed further.

18 Q Okay. And, again, do you know what invention
19 he's talking about?

20 A I do not.

21 Q Okay. Now --

22 A You can't tell from this form, so --

23 Q Can you tell from this form what area? I see
24 that there's a block that says, "In which products,"
25 and then under that there's a parentheses, "(Business

1 Unit)." Do you see that on the form?

2 A Oh, yes.

3 Q And it says what?

4 A It -- as far as I can read it, it says "36."

5 Q Okay. So now we know, right, what they were
6 going to do with it?

7 A I don't think you can tell what they were going
8 to do with it.

9 Q Okay. Would there be a relationship between what
10 they were thinking about possibly doing with it, as
11 they've said on the form, and their assessment of the
12 value of whatever invention they're talking about?

13 A I would think that would be directly related,
14 yeah.

15 Q Okay. And do you know the answers to any of
16 those?

17 A No, you can't tell from this form.

18 Q Okay. Now, they say that the strategic -- I'm
19 now down to block two where the manager, not the
20 inventor, is asked with respect to some invention,
21 what the strategic importance to Nokia of it is.
22 Have I read that correctly?

23 A Yes, it says, "Describe the strategic importance
24 to Nokia by rating zero to five under 'Value of the
25 Invention.'"

Mr. Marcus - Redirect

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1 Q Okay. Now, was Nokia in a variety of businesses
2 at the time?

3 A Yes, my understanding is that they were in a
4 large number of different businesses.

5 Q Okay. Was one of them being a cell phone
6 company?

7 A Not that I'm aware of.

8 Q Okay.

9 A No, I don't believe -- they were more in the
10 equipment business or services.

11 Q Okay. So when they talk about the strategic
12 importance to Nokia, can we read this to determine
13 the value or strategic importance that the document
14 might have to a cell phone carrier, a business in
15 which Nokia was not engaged?

16 A I don't believe so.

17 Q Now, did Comcast place any importance on this
18 document? I know you said you read it after you
19 received those CDs. Did you place any importance on
20 it in deciding the purchase price?

21 A No, the purchase price was already agreed upon in
22 the agree -- in the acquisition agreement signed
23 prior to ever receiving these documents.

24 Q Okay. That answer leads me to another question.
25 Did this document have any -- other than the fact

Mr. Marcus - Redirect

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1 that they had to dump all these documents on you, as
2 you read yesterday, did this -- getting this document
3 couldn't have had any effect on whether or not you
4 were bound to the agreement, Comcast was bound to the
5 agreement, that it has already signed?

6 A Well, as I testified yesterday, there was a
7 signing and a closing. And so, you know, one of the
8 reasons we wanted to receive documents was to make
9 sure there wasn't anything in there that sort of
10 contradicted what Nokia had told us or some other
11 reason that would make us concerned. And, you know,
12 I don't know technically whether the agreement -- you
13 know, it said closing conditions. I think it
14 technically said they only had to deliver the stuff.
15 But if we had seen a problem that really concerned
16 us, we probably would have gone back to them and
17 said, you know, in view of this, we don't want to buy
18 these.

19 Q Okay.

20 A So --

21 Q And did anything like that happen?

22 A There were two things, one unrelated to the 870
23 patent, that I saw, and then that was how I kind of
24 learned that two inventions -- from the material they
25 sent, we hadn't realized until they sent that that

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1 there were actually two inventions that came off the
2 original invention disclosure. So I -- as I recall,
3 I went back to them and wanted to know just what had
4 happened to make sure that we shouldn't also be
5 getting the others. And we determined that we
6 weren't supped -- you know, that it was a separate
7 invention.

8 Q Okay.

9 A So --

10 Q Did anything about this raise problems in your
11 mind?

12 A No.

13 Q This document, this DX-150.

14 A No.

15 Q Okay. Now, we've just seen some entertaining
16 video clip from you. How long ago was that?

17 A You know, I don't remember. A couple years ago?

18 Q Okay. And what was the event?

19 A It was an event down -- and they held it in
20 Washington, D.C., at a law firm's office down there,
21 to just talk about patent stuff. They had inhouse
22 people, outside counsel, all kinds of various people.

23 Q Okay. Now, in that you talked about the ease of
24 getting claims listed in a re-examine proceeding?

25 A Yes, uh-huh.

Mr. Marcus - Redirect

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1 Q Okay. Is it, in fact, a practice to have a lot
2 of more precise claims in when you are putting a
3 patent through re-examination?

4 A Yeah, that's standard practice is to add more
5 claims, assuming they're patentable. So --

6 Q I saw -- I saw a statement that Mr. Finkelson
7 pointed out to you in the file record that said each
8 of the new claims was I think you said narrower than
9 all of the original claims?

10 A Yes. Yeah.

11 Q Will you explain to the jury the importance of
12 that?

13 A Well, I think -- you know, one of the
14 requirements for a patent re-examination is that you
15 can't add broader claims. They have to be narrower.
16 That's just part of that procedure. You're not
17 allowed to broaden the claims in a re --

18 Q You can't expand them?

19 A You can't expand what you're claiming under the
20 patent. You can only add claims of the same scope or
21 narrower.

22 Q Okay.

23 A And getting back to the video, I mean I -- what I
24 was off -- what I was testifying to about there -- or
25 not testifying -- I was speaking about -- what I was

Mr. Marcus - Redirect

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1 speaking about there was that it used to be very easy
2 to go into re-exam and to do -- so what typically
3 would happen is a defendant would get sued and then,
4 you know, people -- patent owners would learn about
5 stuff and then go to the patent office and do
6 re-examinations and -- to basically, you know, take
7 all this stuff in there or whatever.

8 The way re-examinations used to be
9 conducted, they were done by the original examiner.
10 So there was this vested interest in the original
11 examiner not saying they made a mistake. So -- and I
12 testified I think it was yesterday that the way
13 re-exams are done now, there were three primary
14 senior examiners. That was why -- that was one of
15 the reasons they changed it.

16 So the re-exams that they do now, they
17 created a central re-examination unit so it doesn't
18 go back to the original examiner. It goes to three
19 specialists now to address this problem. And it's
20 very -- much more difficult now to go into re-exams.
21 It's not the same thing it used to be. And, you
22 know, Sprint has put our patents into re-exam in
23 other instances, so it must not be that slanted in
24 favor of the patent owner.

25 Q Well, let me -- let me -- when did we put this

Mr. Marcus - Redirect

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1 one -- when did we put the 870 into re-exam?

2 A I believe it was November of 2011.

3 Q Okay. And is that the old regime, the new
4 regime, what?

5 A That's the new regime.

6 Q Oh. Now, can a -- can a patent be put into
7 re-exam if all you're doing is adding amended claims?

8 A No. No, no, you -- the requirement to be able to
9 do a re-examination is that they have this thing
10 called a significant new question of patentability.
11 That's the standard. So, basically, you have to
12 prove to the Patent Office in your petition for
13 re-examination that there's a -- certain pieces of
14 prior art raise a substantial new question of poss --
15 a substantial new question of patentability. So the
16 acronym -- lots of acronyms -- is called an SNQ just
17 because it's long to say that.

18 So you basically propose these substantial
19 new questions of patentability, and you have to
20 specifically lay out, right, here's the piece of
21 prior art, here's the -- you know, the limitation of
22 the claim and how you think it relates to it or
23 doesn't relate to it or, you know, that kind of
24 thing. And for each one of those, the Patent Office
25 decides whether or not they think it does raise a

Mr. Marcus - Redirect

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1 substantial new question of patentability, and then
2 they decide, if they say yes, to institute a
3 re-examination. They can say no, and they do
4 sometimes. And then, you know, if they say now,
5 right, then, you know, obviously, there's no chance
6 to add claims. And -- but even if they do institute,
7 you know, you have the right to present claims for
8 consideration, but they don't have to accept them.

9 Q And now --

10 A So --

11 Q -- I asked you yesterday whether under this --
12 and I was asking you to think perhaps without
13 realizing it, but I was asking under the current
14 regime, the one that's been in effect since 2011,
15 whether or not you were putting your patents at risk
16 by doing a re-examination petition. Is -- to what
17 extent is it a fact that you are putting it at risk?

18 A Yeah, I mean we -- you are putting the entire --
19 every claim in the patent at risk by going in and
20 asking for re-examination. The Patent Office could
21 have looked at what we proposed, the substantially
22 new questions of patentability, declared a re-exam,
23 issued a rejection like they did, and then not agreed
24 with us when we tried to point out how it was that
25 they indeed were patentable. And then the patent

Mr. Marcus - Redirect

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1 would have just been nullified, so it would have been
2 worth nothing. So --

3 Q Now, I think you mentioned just a couple of
4 minutes ago that Sprint has attempted to put some of
5 your -- Comcast's patents into re-exam?

6 MR. FINKELSON: Objection, Your Honor, 402,
7 403 (indiscernible).

8 THE COURT: Objection based on?

9 MR. FINKELSON: 402 and 403, other
10 re-examinations that don't relate to this proceeding
11 have no relevance here.

12 MR. HANGLEY: So if it is relevant, then
13 have the jury (indiscernible).

14 THE COURT: All right. No, no, the
15 objection is overruled.

16 THE WITNESS: I'm sorry, ask the question
17 again.

18 MR. HANGLEY: And I hope we don't get
19 another objection.

20 BY MR. HANGLEY:

21 Q You testified earlier that Sprint had attempted
22 to put some of Comcast's patents into re-examination?

23 A Yes, they put eight or nine of our patents into
24 re-examination.

25 Q Now, do you know whether that was to put your

Mr. Marcus - Recross

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1 patents at risk?

2 A Well, the point of that is to try to invalidate
3 them, yes. And we prevailed in all of those. They
4 were all found valid.

5 Q Thank you very much.

6 MR. HANGLEY: No further questions.

7 MR. FINKELSON: May I have a brief recross,
8 Your Honor?

9 THE COURT: Yes.

10 (Pause in proceedings.)

11 MR. FINKELSON: Mr. Baird, would you mind
12 putting DX-150 back up on the screen, and
13 specifically the first page, left-hand column, if
14 you'll highlight that. So on the very first page of
15 DX-150. Thank you.

16 RECROSS-EXAMINATION

17 BY MR. FINKELSON:

18 Q Mr. Marcus, do you see you have the first page of
19 DX-150 in front of you, sir?

20 A I do, yes.

21 Q Okay. And you see where it says "Inventor's
22 Name" at the top?

23 A Yes.

24 Q And it says Huti Aho, correct, the inventor of
25 the 870 patent?

1 A That is what it says, yeah.

2 Q Okay. And if you go further down in that column,
3 there's an acknowledgment by the inventor, and it
4 says "Signature of Inventor," and that appears to be
5 a signature of "Huti Aho," correct?

6 A I guess so, yeah.

7 Q No reason to disagree, correct?

8 A It looks like it, yeah.

9 Q And, as you talked about, this invention report,
10 DX-150, it covered the invention that led to the 870
11 patent and also another invention? That's your
12 testimony, right, sir?

13 A I just know what they told me.

14 Q That's what they told you, right?

15 A That's what they told me.

16 Q And they also told you the other patent that was
17 covered by this invention report, that was valued as
18 part of this invention report, that also related to
19 messaging, correct?

20 A All I know is that they told me there was a
21 separate one. I'm assuming it related to messaging.

22 Q Do you also assume, or better put, do you
23 remember that Comcast asked to buy the other patent
24 as well from Nokia, and that Nokia said no because it
25 was the more valuable of the two patents to them? It

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1 was --

2 MR. HANGLEY: Objection, hearsay.

3 BY MR. FINKELSON:

4 Q -- more valuable than the 870 patent?

5 MR. HANGLEY: Objection, hearsay.

6 THE COURT: The objection is overruled.

7 THE WITNESS: Okay. That's not what I
8 remember them telling me. Do you want to know what I
9 remember them telling me?

10 BY MR. FINKELSON:

11 Q Sure.

12 A They told me they didn't own it. They said that
13 a different company owned it.

14 Q So that wasn't a patent that you asked to buy
15 from them that they told you was too valuable for
16 Nokia to sell? That was a different patent?

17 A No, it was a -- I'm not understanding your
18 question.

19 Q Fair enough.

20 A I -- well, hold on. I went back to Nokia and I
21 said hey, would you be willing to sell that patent?
22 And they said we don't own it. And they gave me the
23 contact for a related company that owned it. So --

24 Q You were asked, again, about your statements with
25 respect to re-examine. You gave some additional

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1 testimony with respect to re-examine. And you
2 referred to re-examinations, ex parte
3 re-examinations, that had been brought by Sprint. Do
4 you recall that testimony in response to Comcast's
5 questions a moment ago?

6 A I do, yeah.

7 Q And Sprint didn't own the patents that it was
8 challenging in re-examination, did it?

9 A No, they were Comcast patents, so --

10 Q They were Comcast patents, right? And when a
11 party who doesn't own a patent, like Sprint, brings
12 an ex parte re-examination certificate or
13 re-examination request, and that re-examination
14 proceeds, the initiating party, Sprint, it doesn't
15 get to participate in the re-examination, does it?

16 A No, which is indicative of why it's not all that
17 patent owner friendly, or else they wouldn't have
18 done it.

19 Q In fact, they weren't the patent owner. They
20 initiated the re-examination, correct?

21 A Sprint, yes.

22 Q Okay. And once it got initiated, it was Comcast
23 and the government only that got to participate in
24 those re-examinations to which you were referring,
25 correct?

1 A Right. And --

2 Q Right.

3 A -- the inventor.

4 Q And the inventor didn't participate in the 870
5 patent re-examination because you didn't contact her,
6 correct?

7 A I didn't know how to contact her, no.

8 Q Okay. Now, you were making a distinction I think
9 between time periods and two regimes, and Mr. Hangle
10 asked you about the timing of what we saw on the
11 video. In fact -- and you were very close I think --
12 it was in 2015 when you participated on that panel
13 discussion, correct?

14 A That's right, yep.

15 Q And that was several years --

16 A Well, wait a second, I shouldn't say -- I don't
17 remember. I really don't remember.

18 Q You have no reason to disagree, correct?

19 A I don't know, so --

20 Q Okay. Well, the re-examination request related
21 to the 870 patent that Comcast filed, I believe you
22 said it was in 2011. It was either in 2010 or 2011,
23 correct?

24 A Oh, it -- actually, I probably got the date
25 wrong. It's November -- it was November of the same

1 year we bought it, so that would have been 2010.

2 Q Okay. And that was --

3 A So --

4 Q -- certainly several years before you spoke on
5 the video that we just saw, correct?

6 A Right, but we're not seeing the rest of it, and
7 that's what I was referring to was the old regime.

8 Q And that's --

9 A It's very different now.

10 Q Okay. Well, and --

11 A So --

12 Q So the video speaks for itself and you didn't say
13 old regime there, but I'm going to ask you --

14 A Well, you didn't show the whole video. I spoke a
15 lot more too, so --

16 Q Well, I'm sure your counsel will show us if they
17 believe that there is more there that you said other
18 than what we showed. And you were asked about the
19 event. In fact, it was a panel on which there were
20 other panelists as well, correct? You weren't the
21 only one?

22 A Oh, yeah, there were -- there were multiple other
23 people.

24 Q And it was put on by Duke Law School, one of the
25 most prestigious law schools in the country, correct?

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1 A I don't know. I think it's a good law school.

2 Q Nobody -- there's nobody from Duke in the
3 audience. They're not going to hold your testimony
4 against you.

5 A So --

6 Q Other people on the panel with you, they included
7 inhouse counsel from Qualcomm, a company that's in
8 the cell phone industry, correct?

9 A I just don't remember.

10 Q Do you remember that inhouse counsel from Google
11 was also on the panel with you?

12 A I remember a woman by the name of Michel I think
13 is here last name, who I think was at Google.

14 Q Do you also remember that on the panel with you,
15 sir, was the former chief judge of the highest patent
16 court in this country, former Judge -- Chief Judge
17 Michel?

18 A Yeah, uh-huh. I've been on -- I've been on
19 several panels with him.

20 Q Including this one, correct?

21 A Including that one.

22 MR. FINKELSON: No further questions.

23 Thank you, Your Honor.

24 MR. HANGLEY: No questions, Your Honor.

25 THE COURT: Mr. Marcus, your testimony is

1 concluded. You may step down.

2 THE WITNESS: Okay. Thank you, Your Honor.

3 (Witness excused.)

4 MR. GOETTLE: Your Honor, our next witness
5 is Dr. Akl.

6 (Pause in proceedings.)

7 DR. ROBERT AKL, Plaintiff's Witness, Sworn.

8 COURTROOM DEPUTY: Please be seated.

9 Please state your full name and spell it for the
10 record.

11 THE WITNESS: Robert Akl, A-K-L.

12 THE COURT: Good morning, Dr. Akl.

13 THE WITNESS: Good morning, Your Honor.

14 (Pause in proceedings.)

15 MR. GOETTLE: Good morning, Your Honor.

16 I'm sure you're going to be thrilled that I'm going
17 to ask to approach the witness with these three
18 binders. I have a set for you, sir, and for Sprint's
19 counsel as well. Would you like them or would you
20 like them if you want to look at them later?

21 THE COURT: Oh, three binders? And you
22 have two sets for us?

23 MR. GOETTLE: I do.

24 THE COURT: I think we better have them
25 now.

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1 MR. GOETTLE: Okay. May I approach the
2 witness, Your Honor.

3 THE COURT: Michael --

4 AUDIO OPERATOR: Yes?

5 THE COURT: -- will you take them?

6 (Pause in proceedings.)

7 MR. GOETTLE: Apparently, I was --

8 THE COURT: We have one copy.

9 MR. GOETTLE: I'm sorry. Yes, Your Honor.

10 THE COURT: That will --

11 MR. GOETTLE: I --

12 THE COURT: That will suffice.

13 MR. GOETTLE: Okay.

14 (Pause in proceedings.)

15 THE COURT: Maybe what we ought to do is

16 you keep it. If I need it --

17 (Pause in proceedings.)

18 THE COURT: You may proceed.

19 DIRECT EXAMINATION

20 BY MR. GOETTLE:

21 Q Dr. Akl, would you mind -- can you put the
22 binders maybe on the floor behind you? I'd like the
23 jury to be able to see you completely? Would that be
24 all right with you?

25 (Pause in proceedings.)

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1 Q Good morning, Dr. Akl.

2 A Good morning.

3 Q Would you please introduce yourself to the jury?

4 A My name is Robert Akl. I was born in Lebanon.
5 My parents fled to the U.S. in 1976. I was four. I
6 went to school in Maryland, I went to college in St.
7 Louis, and I've been a professor in North Texas now
8 for 15 years.

9 Q Okay. Thank you, Dr. Akl. Dr. Akl, did you and
10 I work together to create a presentation for the jury
11 so that they would understand your testimony, your
12 analysis, and your conclusions today?

13 A Yes.

14 Q Okay.

15 MR. GOETTLE: Can we please put up PD-2?

16 THE COURT: I'm sorry, I didn't hear the
17 number.

18 MR. GOETTLE: Sorry. PD, PAUL, DAVID, 2,
19 PD-2.

20 BY MR. GOETTLE:

21 Q Does this look like the first page of that
22 presentation, sir?

23 A Yes.

24 Q Okay. Do you have a slide that would tell the
25 jury -- well, actually, let's step back. You're the

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1 first expert to testify in this case. So would you
2 please explain to the jury what your role is in a
3 case like this and whether it's typical to use an
4 expert like you in a case like this or atypical? Can
5 you give the jury a sense of that?

6 A Sure. Whenever there is a complicated matter
7 with technical issues, it is common for each side to
8 hire a technical expert. So I was the technical
9 expert hired by Comcast. As a technical expert, I
10 have no financial stake in this matter. I provide
11 unbiased opinion. I am only compensated for my time
12 in this case. And the outcome of this case has no
13 financial stake as far as my compensation. I do my
14 own analysis and I tell counsel my opinions.
15 Sometimes they like it, sometimes they don't. And
16 Sprint will have their own experts, but that's how
17 the expert system works.

18 Q Thank you. You said the word "bias." Did you
19 say "unbiased" or "bias?"

20 A Unbiased.

21 Q I wanted to make sure that the "un" was there.
22 Okay.

23 A I'm just a little nervous, but yes.

24 Q Did you prepare a slide that would indicate to
25 the jury what you were asked by Comcast to do in this

1 case?

2 A Yes.

3 Q Okay. Are we -- is that what is up on slide two?

4 A Yes.

5 Q Okay. What were -- what were you asked by

6 Comcast to do in this case?

7 A So I was asked to look at Sprint, what Sprint was
8 doing, and when I say Sprint I mean Sprint
9 subscribers, Boost subscribers that are under Sprint,
10 and Virgin Mobile subscribers. So Sprint is just a
11 short name for the subscribers in the Sprint
12 umbrella. And to look whether Sprint infringed
13 claims one, seven, and 113 of the Comcast patent
14 through the use of SMS, which is the text messaging,
15 and MMS, which is the multi-media messaging, in their
16 CDMA-based messaging in the time frame 2006 to the
17 present.

18 Q And what did you conclude from your analysis?

19 A I concluded that Sprint did infringe through the
20 use of SMS and MMS claims one, seven, and 113 of the
21 Comcast patent.

22 Q Okay. And I take it the purpose of your
23 testimony today is to explain to the jury your
24 analysis and your conclusion?

25 A Yes.

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1 Q Okay. Before we go into that, why don't we first
2 walk through your background information? So I see
3 you have a slide that's called "Work Experience."
4 Can you please describe for the jury what your work
5 experience has been?

6 A Yes. I am a tenured associated professor at the
7 University of North Texas in the computer science and
8 engineering department. I'm also the Associate Chair
9 of Graduate Studies. I've been at UNT for over 15
10 years, and over that time I've taught over 100
11 courses that deal with wireless communication.

12 Prior to that, I was a professor at the
13 University of New Orleans. I was also a senior
14 systems engineer when I worked in industry at
15 Comspace Corporation. I've also worked in the 90s at
16 MinMax Corporation, TeleWare corporation I did
17 consultancy work, and I also was a research assistant
18 when I was going to school at Washington University.

19 Q So from this work experience, have you had
20 experience with messaging? And you referred to text
21 messaging and multi-media messaging. Have you had
22 experience with that?

23 A Yes, the focus of my work over the last 20 years
24 has been on wireless communication, different aspects
25 of wireless communications, including messaging.

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1 Q Okay. Okay. Well -- and please tell the jury
2 about your educational background.

3 A So, like I said, I went to college in St. Louis.
4 I went to Washington University in St. Louis. I have
5 a Bachelor of Science in Computer Science, a Bachelor
6 of Science in Electrical Engineering, my Master's in
7 Electrical Engineering, and my Doctorate in
8 Electrical Engineering. And my dissertation for my
9 Doctorate was on CDMA, which is the technology that
10 Sprint uses.

11 Q Okay. And what are your specialties?

12 A So my specialties are cellular communication, and
13 under the umbrella of cellular communication, over
14 the years I've looked at the different generations.
15 So 2G means second generation, like GSM, CDMA, and
16 I'll explain those acronyms. 3G, which is the third
17 generation, and 4G, now LTE, which is the fourth
18 generation that is being employed. I also worked on
19 different aspects of wireless communications like
20 Wi-Fi, Bluetooth, sensor networks. With my
21 background in both computer science and electrical
22 engineering, I can look at a problem from both a
23 software and a hardware perspective and do an
24 analysis.

25 Q So I think we heard a little bit about, or at

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1 least the acronyms, 2G and 3G and 4G, but could you
2 just in a little bit of detail explain to the jury
3 what does that mean?

4 A Yes. So in second generation there are two main
5 cellular communications technologies: GSM, which came
6 out of Europe, and CDMA, which was pioneered by
7 Qualcomm in the United States. Both were used all
8 around the world. So, for example, in the U.S. we
9 have four major carriers. AT&T uses GSM and T-Mobile
10 uses GSM. Verizon uses CDMA and Sprint uses CDMA.
11 Those two technologies evolved to 3G and there were
12 two standard-setting bodies. GSM became WCDMA. It's
13 kind of confusing because CDMA was -- part of aspects
14 of CDMA's second generation was good, so it was
15 adopted for the third generation of GSM and it was
16 called wideband CDMA. While the third generation of
17 CDMA is referred to as CDMA2000.

18 With the fourth generation, the different
19 standard-setting bodies agreed on a single standard,
20 and that's LTE, that basically now all four major
21 carriers use.

22 Q Dr. Akl, were you in the room yesterday during
23 the opening statement of Sprint's lawyer?

24 A Yes, I was.

25 Q Okay. And do you recall Sprint's lawyer

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1 referring to the old school, European cellular
2 network?

3 A Yes.

4 Q What -- do you know what cellular network or what
5 technology the Sprint attorney was referring to?

6 A I believe he was referring to GSM, which came out
7 of Europe.

8 Q And in terms of timing -- well, and then do you
9 recall Sprint's lawyer during his opening statement
10 referring to the American standard. What technology
11 was -- if you understand it, what technology was
12 Sprint's attorney referring to?

13 A I believe he was referring to NC41, which is
14 CDMA.

15 Q Okay. So in terms of timing, is GSM, which is
16 what the attorney referred to as the old school,
17 European standard, was that a lot earlier, a lot
18 older, than the American -- the American standard
19 which you referred to as CDMA?

20 A No, they're both around the same time and they
21 were -- they're both competing technologies that were
22 developed around the same time and they're both
23 considered second generation. And both are
24 actually -- were adopted around the world. And then
25 both evolved into third generations.

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1 Q Okay. So in terms of the American standard
2 cellular network, which you referred to as CDMA, is
3 that only used in America?

4 A No, CDMA is used all around the world. It's
5 actually also used in Europe, like Germany and
6 Poland, it's used in Asia, in China, in Japan, it's
7 used in India, it's used in South Africa. So the
8 standard itself, there is -- the two main standards
9 are used -- both of them, they're used all around the
10 world.

11 Q Well, okay. So how about GSM, which I think was
12 referred to yesterday as the old style, European
13 standard? Is that used worldwide? Is that used in
14 the United States?

15 A Yes, and it's common. Just like in the U.S., you
16 have different cellular providers, and for different
17 cellular providers to use one or the other.

18 Q Okay. Okay. So let's go back to your
19 background. Can you explain to the jury about your
20 publications?

21 A Yes. So being a professor, of course, you're
22 expected to publish and to do research, which I do.
23 I have master's and Ph.D. students that I supervise.
24 And over the years, I've published journal papers,
25 conference papers, technical papers, book chapters.

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1 I've also designed mini courses, like Voice-over IP,
2 Intro to Wireless Communication, Advanced Wireless
3 Communication. The most recent course is on LTE that
4 I teach my Ph.D. students. And I've received
5 multiple funded proposals, both educational and
6 research-oriented.

7 Q You mention LTE. Can you put that into the
8 framework of this 2G, 3G, 4G, just so the jury gets a
9 sense of these acronyms?

10 A Yes. So LTE stands for long-term evolution,
11 which is the fourth generation cellular standard. So
12 this is what's all for -- AT&T, Verizon, T-Mobile,
13 and Sprint now have LTE in their networks.

14 Q Okay. Can you tell the jury about your honors
15 and awards and any one that you're particularly proud
16 of?

17 A Sure. So over the years I've received different
18 honors and awards. The two that I am very proud of
19 is the IEEE Professionalism Award from the Forth
20 Worth Chapter. IEEE stands for the Institute of
21 Electrical and Electronics Engineers. It is the most
22 prestigious professional society in the U.S. and
23 maybe worldwide. I received that award for the work
24 that I was doing in promoting engineering among high
25 school students.

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1 I've also received the UNT College of
2 Engineering Outstanding Teacher Award that I'm also
3 very proud of.

4 Q Thank you.

5 MR. GOETTLE: Your Honor, I offer Dr. Akl
6 as an expert in the field of the invention of
7 cellular technology and messaging.

8 MR. FINKELSON: No objection, Your Honor.

9 THE COURT: What we've done up to this
10 point, ladies and gentlemen, we've heard about Dr.
11 Akl's qualifications, and he's been offered as an
12 expert in cellular technology and wireless
13 communications, is that --

14 MR. GOETTLE: General -- I offer him as an
15 expert in the field of the invention, which relates
16 to cellular technology and messaging in particular.

17 THE COURT: And messaging. And the defense
18 has an opportunity to cross-examine. They opted not
19 to do so. So I will accept Dr. Akl as an expert and
20 you will hear his opinions. The weight to be given to
21 his opinions is for you to determine, and I will give
22 you some instructions on that in my jury charge at
23 the end of the case. But keep in mind you may accept
24 his testimony, or reject it for that matter. He is
25 being offered as an expert in the field of the

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1 invention. You may proceed.

2 MR. GOETTLE: Thank you, Your Honor.

3 BY MR. GOETTLE:

4 Q So before we -- before we go into your analysis
5 and your conclusions, Dr. Akl, please describe for
6 the jury how you went about performing your
7 investigation.

8 A So I was originally retained three or four years
9 ago. So I've been working on this case for a few
10 years. And over the course of those years I've
11 looked at thousands and thousands of pages and
12 hundreds of documents.

13 The first thing, of course, when I was
14 first retained was I was given the patent. So I read
15 the patent, the 870 patent or the Comcast patent, I
16 looked at the -- and read the prosecution history,
17 the re-examination, understood the patent. And then
18 there are a lot of court documents that becomes
19 available at different points in time. In your
20 binder I believe there's a court claim construction.
21 So these are the definitions that the Court gives us.
22 So those definitions I have used and adopted in my
23 analysis.

24 There are also a lot of documents that
25 Sprint produced in this case. I looked at all these

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1 documents. There are testimony of Sprint engineers
2 and third party engineers that were deposed outside
3 of this courtroom, and the transcripts become
4 available so I read that. So all of that helps put
5 the case together, in a sense. I also relied on Dr.
6 Dwoskin, who is another expert. He did analysis on
7 databases. And I will -- when we get to that part
8 I'll point out what I relied on him for. Industry
9 standards like the CDMA standards, GSM standards --
10 in this case the CDMA standards are more relevant,
11 and the different documents that were produced. So
12 all of that over multiple years I have gone through
13 in order to get to the point that we are today and to
14 come up with the conclusions that I have today.

15 Q Thank you. Okay, I just put up slide nine. Are
16 these the topics that you're -- is this showing the
17 topics that we're going to walk through for the jury?

18 A Yes. So I'm going to talk about five major
19 topics. The first one -- so that we're all on the
20 same page, I'm going to provide a background on
21 cellular networks and we're going to talk about the
22 messaging in 1999. Then we're going to switch gears
23 a little bit. We're going to talk about the patent
24 and the 870, the invention. And then we're going to
25 talk about Sprint's documents that I read and

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1 analyzed. And then the last part, probably the most
2 important, where we're going to look at infringement,
3 where we have to look at the claims and look at what
4 Sprint does. So we're going to walk through these
5 one at a time, starting with the background.

6 THE COURT: I'm thinking that before we get
7 into the first of these five topics, we ought to talk
8 our mid-morning break so as not to interrupt, to the
9 extent we can avoid it, his testimony on these five
10 topics. So it's 11:00. We'll be in recess for ten
11 minutes. We'll reconvene ten minutes after 11:00.

12 (Jury out, 11:00 a.m.)

13 THE COURT: We're in recess for ten
14 minutes. You may stay there.

15 (Recess taken from 11:01 a.m. to 11:14
16 a.m.)

17 THE COURT: Be seated, everyone. You may
18 proceed.

19 MR. GOETTLE: Thank you, Your Honor.

20 BY MR. GOETTLE:

21 Q So, Dr. Akl, are you going to first speak
22 about -- explain to the jury the background of 1999
23 cellular networks?

24 A Yes.

25 Q Okay. Please go ahead.

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1 A So a cellular network starts out with a mobile
2 phone. That's the greatest thing, is having a phone
3 that you can take around with you. What that means,
4 no wires, the communication between the phone over
5 the air. So the phone has antennas and the cellular
6 network has what we call towers. So these are very
7 large towers that the antennas are on. So like here,
8 those would be the cellular towers. Then the area
9 that is covered by -- where you have coverage by a
10 specific antenna would be called a cell.

11 Q Okay. Just so point of clarification. I know we
12 wrote "1999 Cellular Technology" at the top, but is
13 this the same, true, today?

14 A This has not changed, yes.

15 Q Okay.

16 A And how do delete --

17 (Pause in proceedings.)

18 MR. GOETTLE: Sorry, Your Honor.

19 BY MR. GOETTLE:

20 Q Okay. What are you showing on this slide? Sorry
21 for the interruption.

22 A Okay. So to build the network we have multiple
23 towers, and multiple towers would cover an area. And
24 what's important is even though you may have two cell
25 phones in the same house next to each other or across

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1 the street, the two cell phones never communicate
2 directly with each other. So regardless of where
3 they are, whether you're talking to somebody in the
4 same house, both of you on your cell phone, or
5 talking to somebody across the country, all
6 communication takes place between the cell phone and
7 the cell tower. And we have hundreds of these towers
8 that would cover the different areas.

9 So back in '99, what has changed between
10 that and today is really the amount of towers and the
11 coverage. So as the networks were being built, the
12 major cities had really good coverage, and maybe
13 outside in, you know, in between states and stuff
14 where you're driving in the middle of nowhere, you
15 wouldn't have as much of a coverage. Now pretty much
16 most of the U.S. has good coverage.

17 Q So in looking at slide 11, are these cell phones
18 that you have on there where you have a cell, where
19 there's two phones talking to the tower, can the cell
20 phones talk to each other through the tower the way
21 this diagram might be misinterpreted?

22 A So they talk to each other through the tower and
23 the backbone network, but the phones never talk
24 directly to each other. So what I have next is a
25 slide expanding on this idea. So what you see here

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1 is we have user A, and he is making a phone call and
2 he -- the signal travels over the air from the phone
3 to the cell phone tower, and he says I need a ride.
4 And then the telecom networks, so the back network,
5 is going to carry the traffic and the signaling to
6 user B, whether it's in the same cell or a different
7 cell. And then user B's phone is going to ring and
8 it's just going to hear a message.

9 So what we need to keep in mind is that we
10 classify the channels in two categories. So we say
11 we have traffic channels. And that's like user voice
12 or use data. We call that traffic. And we classify
13 the other type as control channels. So control
14 channels are the signaling, everything else that
15 needs to take place in the background for the call to
16 complete.

17 Q So just to go back, I see that the -- on slide 15
18 there's purple -- you have a purple arrow, and then
19 on slide 16 you have a -- I don't know what color
20 that is, brown or orange-ish arrow. Is there a -- is
21 that a significant -- are you trying to signify
22 there's differences?

23 A Yes. So even if you're not on your phone
24 directly making a call, there is going to be
25 signaling traffic and control traffic that's taking

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1 place. So even when your phone is on standby, every
2 so often the phone is going to communicate with the
3 network and it's going to say hey, I am here. The
4 network is going to -- the phone is going to register
5 with the network every so often so that when you're
6 driving around the network knows even though you're
7 not on a call, there is signaling traffic, there is
8 control traffic that happens that knows where your
9 phone is.

10 Q Okay. Are there -- are there more pieces of a
11 cellular network than what you've shown the jury so
12 far?

13 A Yes, and we're going to go through those.

14 Q Okay. So I just put up slide 23. Can you go
15 through those -- go through those other pieces?

16 A Yes. So far, we've talked about the phone, we've
17 talked about the cellular tower, and there are
18 specialized computers at the bottom of those towers.
19 It's called a bay station controller because the
20 tower is normally called the bay station. And so
21 this is the two aspects. The third is the core
22 network elements. And that's probably the most
23 important. That's what -- that's what allows the
24 phone to communicate to each other and the phones to
25 communicate to outside networks. So the core network

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1 elements are those essential components that are part
2 of the cellular network that makes the magic happen.

3 Q And what do the core network elements do to make
4 that magic happen?

5 A Yes. So core network elements are what do the
6 switching, the lookup. So I have an analogy here,
7 and this is -- I'm dating myself, but some of you may
8 know Lily Tomlin back in the 50s, and she played the
9 switchboard operator. So this is an analogy from the
10 regular phone lines where you had users that would
11 connect the call. So this is the core essential
12 functionality. So the essential functionality is
13 being able to connect the call, to route the call.

14 So in a cell phone -- in a cellular
15 environment, in a cellular network, you do have the
16 core network elements that allow the phones to
17 communicate with each other and with outside networks
18 like, for example, the wired networks. So someone on
19 a cell phone can call somebody on a land line or
20 connect to the internet and so on. So --

21 Q So in this -- in this analogy that you have, what
22 are the switchboard operators doing?

23 A So in this analogy, what they're doing is they
24 have the wires and they -- you know, a call comes in
25 and they plug it in and complete the call, and the

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1 way to know how to plug it in is they have the
2 notebooks in front of them, so they look it up and
3 they see what call is going to be connected to what
4 user and they manually do it.

5 Now, this functionality, this essential
6 functionality is now being done by computers. But
7 the idea and the analogy is still the same.

8 Q Okay. So what are you showing on slide 25?

9 A So to recap what I was saying, is those core
10 network elements are going to be very important and
11 we're going to -- we are going to look at the Court's
12 construction, and you already saw that earlier.
13 We're going to talk about this essential
14 functionality that allows these elements to -- for
15 the phones to talk to each other and to talk, for
16 example, to a wired phone line, to the public switch
17 telephone network, which is abbreviated PSTN. That
18 stands for public switch telephone network. These
19 are just the regular land lines that have been around
20 for 100 years.

21 Q And does the cellular network, or particularly
22 the core network, does it communicate with other
23 types of networks?

24 A Yes. On your cell phones you can also talk to
25 the internet, for example, and the ability to connect

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1 the phone -- even back in '99, the internet was
2 phone, you had very basic email on your phone, but it
3 was a capability. And the ability to switch and to
4 connect those phones to the internet was handled by
5 the core network elements.

6 Q And in 1999, sir, was it -- was it known to have
7 other services that could connect to the cellular
8 network and take advantage of the core network
9 elements?

10 A Yes. There are adjunct services like fax. You
11 can receive a fax on your phone, voicemail, and
12 messaging. So those are additional adjunct services
13 that are great in terms of the -- you know, some of
14 them took off, some of them, you know, didn't take
15 off as much, but those are all additional services
16 that the core network element facilitated by allowing
17 the phone to communicate with the outside networks
18 and offer additional services.

19 Q All right. So, Dr. Akl, are we right in seeing
20 that we're done one out of five topics already?

21 A Yes. So this is the overview, very high
22 overview, of a cellular network.

23 Q Okay. So now you're going to talk about
24 messaging in 1999?

25 A Yes.

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1 Q Okay.

2 A So in '99, we had text messaging, and text
3 messaging wasn't very prevalent. It was -- they were
4 able to offer it because already you had the
5 infrastructure in place. You had the towers, you had
6 the phones, you had the signaling, you had the
7 control. The protocol that was used is called SS7.
8 It's another acronym we throw in. But the
9 infrastructure was there.

10 So because we already had, in a sense, the
11 technology and the infrastructure, you could be able
12 to use the signaling, the control channels, to send a
13 very short text message. It wasn't very prevalent
14 because the phones at the time weren't conducive.
15 The phones in 1999 looked like the phones that you
16 had at home except they were smaller -- or they
17 started out being bigger, and then gradually they
18 became a little smaller. But as far as their
19 functionality, you had the numeric keypad. And so in
20 order to send a text message, if you recall back in
21 the -- in '99, you had to use your numeric keypad to
22 type the word. So the letter A, B, C are attached to
23 the number two. So if I want to type "apple," I
24 would have to two, and if I want the letter B, I have
25 to press it a couple times.

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1 So for me to type a little phrase, you
2 know, was horrible. I mean it was a horrible
3 process. And also, the phones weren't used the way
4 they're used today. They weren't as ubiquitous. In
5 '99, you -- you know, those -- the plans were
6 expensive. You would have your phone more for
7 emergency purposes. Most often it was, you know,
8 just turned off or you just carry it with you in case
9 there is an emergency. You would turn it on, you
10 would make a call.

11 So this was the state of the calling and
12 the messaging back in '99. And things changed. And
13 what changed is -- one big change is really the
14 phones themselves. And so a company called
15 Blackberry -- they weren't the first, but a company
16 called Blackberry pioneered phones with keyboards,
17 and you had -- some people loved their Blackberrys
18 because of the keyboard. They had a physical
19 keyboard in your phone. And what the physical
20 keyboard allowed you to do is to send email, it made
21 it easier to text, and originally, it was geared
22 towards business users, and it was expensive, but
23 they -- but they caught up and business users loved
24 their Blackberry phones. And this was around 2002.

25 Fast forward a little bit later to 2007.

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1 2007, Apple did something similar in terms of they
2 created the iPhone where instead of having a physical
3 keyboard, you had a virtual keyboard. So now you had
4 a bigger screen that if you wanted to text, the
5 keyboard would pop up and then you can type your text
6 message, you can type your emails, and then they
7 keyboard would go away, and that's the smart phone
8 that we have today.

9 So there were a lot of factors, both in
10 terms of who would carry phones in the late 90s, the
11 generation of people that just used them for calling
12 and the generation that, you know -- several years
13 later, the young generation, that basically texts
14 like crazy, they don't like calling, everything is
15 done through text. And the devices that made it a
16 lot more conducive to send texts, and so what we saw
17 is texting become this huge business, and now we have
18 trillions and trillions of text messages that are
19 being sent today.

20 Q So that's today, but in 1999, was that the case?

21 A No. So in '99, texting wasn't as much of an
22 issue because one, the messages themselves were
23 small, and two, you didn't have that many of them so
24 the network can handle them. So it wasn't as much of
25 an issue back then.

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1 Q Okay. Okay. On to topic number three, the
2 invention of the 870 patent.

3 A Yes. So now we're going to switch gears a little
4 bit and I'm going to talk about the Comcast patent.
5 And, actually, do you want me to use --

6 Q Yeah.

7 A -- the whiteboard?

8 Q Yeah.

9 MR. GOETTLE: Your Honor, I'd ask that --
10 if the witness could step down and write on the
11 whiteboard. I think I would like to do the first
12 part of the examination about the patent using the
13 whiteboard.

14 THE COURT: That's fine.

15 (Pause in proceedings.)

16 Q So, Dr. Akl, can you please step over here?

17 A Yes.

18 (Pause in proceedings.)

19 THE COURT: Mr. Finkelson, you can
20 certainly move your position --

21 MR. FINKELSON: Thank you, Your Honor.

22 THE COURT: -- so that you can see what the
23 doctor is writing on the whiteboard.

24 MR. GOETTLE: Your Honor, is that placement
25 okay for you or --

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1 THE COURT: That is, and at the conclusion,
2 I want this marked as an exhibit.

3 MR. GOETTLE: Absolutely, Your Honor.

4 BY MR. GOETTLE:

5 Q So, Dr. Akl, I think -- I think what would be a
6 good start -- what would be a good start is let's
7 talk about the problem that the inventor was trying
8 to solve.

9 A So we've talked -- we've given you a little
10 history in '99 on the cellular network and the
11 messaging network, and so the -- so the problem that
12 was being -- that the inventor was trying to solve is
13 message volume. So -- and so message volume comes
14 into play in two ways. When we think of text
15 messages, text messages are small. So in terms of
16 the size of the message itself, it's not an issue.
17 But when you have not millions, not billions, but
18 trillions of text messages, then the issue of speed
19 and congestion becomes an issue in terms of those
20 messages, that they're being routed in the cellular
21 network, they're going to bog down the network.

22 Message problem also comes into play when
23 we think of MMS messaging, and this is the multi-
24 media messaging. Now, the SMS -- and that's short
25 message service, which is the same as text message.

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1 Those standards were done before '99, but MMS was
2 not. So MMS, back in '99, people were talking about
3 yes, we want to be able to instead of just sending a
4 text message, we want to send a multi-media message,
5 we want to send a file, we want to send a picture, we
6 want to send a video. So there is already a problem
7 in terms of the size of those files. The size of an
8 MMS is going to be (indiscernible). And so --

9 Q Could you -- but why is the size of a message
10 bigger -- I take it that an MMS message is bigger.
11 Why is that?

12 A Yeah. So because of its sheer size, if you have
13 those messages being routed in a cellular network and
14 they can lower the speed, they can cause congestion,
15 if they're just going back and forth and trying to be
16 delivered. And so we have to look at what the
17 cellular network is doing when we have millions and
18 billions and trillions of text messages. But even
19 when we don't have those large numbers, when we have
20 the multi-media messages, just because of the size of
21 that message it's going to cause congestion because
22 it needs additional bandwidth.

23 Q Thank you.

24 A And --

25 Q So I take it the inventor had a solution to this

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1 problem?

2 A Yes. So the solution to this problem was why
3 don't we keep the messages out of a cellular network
4 until phone is ready to receive. And so what this
5 means is -- what the inventor conceived of is instead
6 of having those messages, you text -- you generate
7 the message. It's in the cellular network. It's
8 going to be routed in the cellular network, it's
9 going to be routed by these core network elements.
10 And like we were saying in '99, the phone may be on,
11 the phone may not be on, you may have coverage, you
12 may not have coverage, and the network is trying to
13 see if the phone is ready or not. If the phone is ready,
14 it delivers it, if the phone is not ready, the
15 message is still in the network.

16 This may not be as much of an issue in '99
17 with text messages, but with multi-media messages
18 this is already going to be a problem with those
19 messages in the cellular network causing congestion,
20 lowering speed. And then we have millions and
21 billions and trillions of text messages, that is also
22 going to be a problem. And so what the inventor came
23 up with, let's -- once we generate the message let's
24 take it out of the cellular network until the phone
25 is ready to receive it, and then we can just deliver

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1 that message.

2 Now, this caused another problem. So now
3 we have --

4 Q Before we -- before we go to the other problem,
5 why -- what did most of the time the network -- why
6 didn't most of the time the message be able to sent
7 right through the phone? Like why would it cause
8 congestion if in the end the message still has to go
9 through the network to get to the other phone?

10 A Because if you go back to the analogy of -- that
11 I had of the operators that are connecting the call,
12 the cellular network -- and the purpose of a cellular
13 network is to have these calls connected. So it's
14 already handling all this call volume. And now we
15 want the core network elements, in addition to
16 handling the regular calls and the switching of those
17 calls, to also do the switching of the messages.

18 So if you think of the analogy of the
19 people sitting, and if I -- you know, on a little
20 post-it I give a text messages, if it's one or two,
21 yes, I an go ahead and read the text message and
22 route a text message. But when I have billions and
23 trillions of text messages then all these text
24 messages are going to clog down those operators or
25 the core network elements that are switching and

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1 doing their job with the caller.

2 Q You said you were going to talk about another
3 problem?

4 A Yes. So now I'm going to call this problem one,
5 solution one, and I'm going to call this now problem
6 two. So problem two is we have now the messaging
7 server, and the messaging server only knows the phone
8 number. So by taking the message out of the cellular
9 network and storing it in a messaging server, the
10 messaging serve now doesn't know what is happening in
11 the cellular network, doesn't know if the phone can
12 receive a message. It doesn't know anything about
13 the phone. That information is in the cellular
14 network. And so this is now going to cause a
15 problem.

16 So the patent anticipated that and came
17 with a solution to the second problem. So solution
18 two to this problem is now the cellular network is
19 going to map the phone number to an internal
20 identifier -- and I'll talk a little bit about
21 that -- until -- and then send a response -- and send
22 a response. Thank you.

23 So by taking the functionality of the core
24 network elements and then having them just
25 concentrate on the functionality which we've been

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1 talking about, that's essential functionality, not
2 having that functionality be bogged down by the
3 messages. The messaging server now only knows the
4 phone number. How can the message be delivered?

5 The messaging server, having only the phone
6 number, is going to ask the cellular network. It's
7 going to say okay, is this phone ready to receive?
8 And the cellular network is going to map the phone
9 number to an internal identifier like an ID, a serial
10 number for a phone, or another identifier that
11 uniquely identifies the phone. It's going to look up
12 is the phone ready to receive? And once the phone is
13 ready to receive it's going to send a message saying
14 yes, the phone is ready to receive.

15 If the phone is not ready to receive, it's
16 going to also send a message, no, don't send the
17 message. And the messaging server is going to hold
18 on to that message. And once it gets notification
19 that it's ready to receive, that's when the message
20 is going to leave the messaging server and now it can
21 be handled by those core network elements. So the
22 core network elements aren't going to be doing the
23 same task multiple times, aren't going to be trying
24 to route a message multiple times. They're only
25 going to do it once and this is going to help with

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1 the speed and the congestion of the network.

2 Yeah, I'm done with this and we're going to
3 now look at the patent. I'm going to show you how
4 this is in the patent.

5 THE COURT: How do you want to identify
6 that?

7 MR. GOETTLE: Why don't I -- I'll write
8 right on it "Plaintiff's Drawing 1," Your Honor?

9 THE COURT: All right.

10 MR. FINKELSON: No objection if you don't
11 have an objection.

12 MR. GOETTLE: No, unfortunately, I got to
13 write it.

14 MR. FINKELSON: Maybe "Problem 1" and
15 Problem 2" would be easier.

16 (Pause in proceedings.)

17 MR. GOETTLE: I was worried I was going to
18 misspell "plaintiff's."

19 (Pause in proceedings.)

20 BY MR. GOETTLE:

21 Q Okay. So, Dr. Akl, are you going to now talk
22 about how the patent describes the two problems and
23 the two solutions that you've described?

24 A Yes. So we had the coversheet of the patent.

25 Q Oh, do you want me to go back to that?

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1 A That's fine, I'll just --

2 Q Why don't we -- why don't we go back to it?

3 What -- who was the -- do you know who the inventor
4 was?

5 A So the inventor on the patent is Ms. Aho. The
6 assignee is Nokia. And, you know, at the time back
7 in '99, Nokia was a giant in the field. They had
8 excellent technology, they had great phones.
9 Unfortunately, things changed, you know, a decade
10 later. But this was originally, as you had seen, a
11 Nokia patent. And in the -- I don't know if we --

12 Q Actually, before we do that, it just occurred to
13 me. So yesterday, we heard some testimony about
14 Nokia and the state of Nokia a decade after 1999.
15 What is your understanding of the state of Nokia a
16 decade after 1999?

17 A So, as somebody in the cellular field, I follow
18 companies and I was a huge Nokia fan. I think -- you
19 know, my -- I had a Nokia phone back in the late 90s
20 and it was an excellent phone. What had happened
21 was, you know, they made great phones. They had an
22 operating system called Symbian. And when we saw
23 in -- you know, the Blackberry launched, and Nokia
24 had phones with keyboards and they were good phones.
25 And then the iPhone launched. With the launch of the

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1 iPhone what had happened was people loved the iPhone.
2 And Google, you know, some argue copied or not --
3 that's a different story -- had their Android
4 operating system. So now we have the Android phones
5 and different manufacturers, and we have Apple and
6 their operating system. And those smart phones
7 just -- people loved.

8 So Nokia, you know, had their Symbian
9 phones. They tried to compete in the smart phone
10 market, but, unfortunately, they didn't. When you
11 look at worldwide, you had a lot of, you know, third
12 world countries that were still buying, you know, the
13 old traditional phones. So, you know, we -- I heard
14 testimony that -- I don't know what year, like 2010,
15 they were number one. They may have been number one
16 worldwide in terms of number of phones because you
17 have a lot of the very inexpensive like flip phones
18 that were still being sold worldwide. But that was
19 not the case in the U.S.

20 If you look at their market share, 2010 was
21 really like the beginning of the end for them. It
22 was where they peaked in market share in terms of
23 smart phones, and then it started falling. In 2011,
24 it was actually half of that. It was like around
25 maybe 40 percent in 2010, dropped to 20 percent. In

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1 2012, it was like ten percent. And if you, you know,
2 read the news and -- I mean I do -- Microsoft tried
3 to help them. They had a pact with Microsoft. Nokia
4 was supposed to carry the Windows platform that was
5 supposed to be the third. It never really took off
6 and, virtually, you know, Microsoft bought the Nokia
7 handset market. The market share never was like more
8 than one or two percent. And really, what we have now
9 is just the iPhone ecosystem and we have the Android
10 ecosystem. So this is a brief history of what
11 happened.

12 Q Okay. I wasn't -- I wasn't ready for all that,
13 but okay. Thank you. So let's turn -- now let's go
14 back to the patent and talk about the -- where the
15 patent discloses the two problems and the two
16 solutions that you reference.

17 A Yes. So going back to the invention and what
18 Nokia -- what the inventor came up with. So you see
19 the specification. This is the bottom of the patent
20 that's describing the invention. It's talking about
21 that what we want to do is we want to speed up the
22 network, we want to have the message only delivered
23 when the phone is ready to receive it. And so this
24 is the problem-solution, the first problem-solution
25 that I described.

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1 Q Okay. And does the patent also describe the
2 second problem and second solution?

3 A Yes. And so the -- and having the messaging
4 server not knowing what's happening in the cellular
5 network is introducing the second problem, and so the
6 solution is now we want to have like a first
7 identifier. And the first identifier is like a phone
8 number. It's a number that the messaging server
9 would know because when you text, the phone number
10 goes with that. And then that's what's used in the
11 cellular network to map to the second identifier,
12 that unique ID that describes a specific phone.

13 Those is important on a lot of different
14 levels. It's important because you may have
15 different phones at different points in time, but you
16 want to keep the same phone number. And so the
17 network needs to have something other than your phone
18 number that identifies your phone so that when you
19 keep your number and you change phones the network
20 can know that you have a different phone.

21 So in the cellular network phones are
22 identified by a unique number. You also have phones
23 with different capabilities. So some phones can
24 receive videos, some phones can receive large files,
25 some phones can receive small files. So the network

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1 maintains and knows the capabilities of the phone.

2 So this is exactly the solution to not having the
3 messages keep going through the cellular network and
4 having the second identifier tell the messaging
5 server yes, these are the capabilities of the phone
6 and the phone is now ready to receive.

7 Q Dr. Akl, back in 1990 -- you just referred to the
8 ability to keep your phone number but change your
9 phones?

10 A Yes.

11 Q Okay. So meaning if you update -- you update and
12 get a new phone, you don't have to get a new phone
13 number?

14 A Correct.

15 Q In 1999, was that a requirement?

16 A No, that was not a requirement, but this patent
17 solved that issue as part of the invention. And the
18 idea of mapping was actually a very good solution to
19 that problem.

20 Q When did -- when did that become a requirement,
21 to be able to change your phone and update it and
22 keep your same phone number?

23 A 2003. So the number portability isn't really
24 mentioned in the patent, but the solution that the
25 patent gave applies very well to the number

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1 portability.

2 Q Okay. Number portability, can you explain that?

3 A Yes, so the term "number portability" is the
4 ability -- so this is something from the FCC. So
5 this is the government telling the network operators
6 don't take users hostage in the sense that, you know,
7 if you're changing -- if you want to switch from AT&T
8 to Verizon or you want to move, you lose your phone
9 number because it was a way for, you know, customers
10 to kind of stay locked in. And so the ability to
11 take your number with you, the ability to maintain
12 the same phone number, not have to change it, had to
13 be decoupled from the phone and from the operator.
14 So the same requirement actually applied to the
15 original wired phone I think in the late 90s.

16 Then in 2003, cellular operators like AT&T,
17 you're with them, you're not happy, you want to move
18 to Verizon. You should be able to take your phone
19 number with you and then you would need a different
20 phone number on a different network. That's called
21 number portability.

22 Q Okay. Okay. Are you now going to talk --
23 explain to the jury the claim -- oh, I skipped a
24 slide. I apologize. So I take it the patent applies
25 to what you referred to as MMS messages?

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1 A Yes. So the patent is -- describes the MMS
2 messages and gives examples like a picture, a fax, a
3 video, but the patent is restricted to MMS and it
4 equally applies to SMS, and these are the short text
5 messages. So it applies to both.

6 Q Okay. Okay. Are you now going to explain the
7 claim one to the jury?

8 A Yes.

9 Q Before you go into that, just to be clear, are
10 you -- right now, are you only going to explain claim
11 one?

12 A Yes. So what I'm going to do is -- we're still
13 talking about the patent and I'm going to walk
14 through claim one, but in talking about claim one I'm
15 going to introduce the jury to something in a couple
16 seconds that's called the call flow. And this is
17 important because when we look at Sprint documents
18 later there's going to be a lot of call flow. So I'm
19 going to try to help you understand what a call flow
20 is. But now I'm not looking at a Sprint document.
21 I'm just looking at the claim. But I'm going to map
22 the language in the claim to a call flow, just to
23 kind of give you an idea of where we're headed.

24 Q Okay. So I just put up slide 41. What is slide
25 41 showing? First of all, what is the numbered

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1 paragraph I see at the top on the --

2 A Okay.

3 Q -- on the right?

4 A So this is claim one. And as you may have heard
5 before, the first couple lines are called the
6 preamble of the claim. And so in the preamble of the
7 claim it says we have a method for inquiring about
8 information about -- relating to a wireless terminal.
9 So the wireless terminal is just the phone, the
10 mobile phone, and this is what I have drawn on the
11 left -- of a cellular network, so we need a cellular
12 network and I'm using my graphic still on the right
13 part of the -- left part of the slide. And the
14 cellular network, that's the phone, and the base
15 station system, and the core network elements from a
16 cellular network by a messaging server that is
17 external to the cellular network. And what I drew in
18 the middle is the messaging server. And in a -- in a
19 couple slides down I'm going to explain -- the Court,
20 just like they gave us a definition for "cellular
21 network," they also gave us a definition for a
22 "messaging server," and what I'm showing you here is
23 that definition, but I'm going to go into that in
24 detail, and there's two functionalities that the
25 messaging server needs to have, but I don't want to

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1 overwhelm everything on one slide, but we're going to
2 get there.

3 Q Okay. So what happens to sort of instigate the
4 method of claim one?

5 A Yes. So the first thing that needs to happen is
6 someone needs to send a text message or someone needs
7 to send an MMS message. So what I'm showing you --
8 so this is called the call flow and it's read left to
9 right, top to bottom, and it shows arrows on like
10 vertical lines. Sometimes it's called like a ladder
11 diagram because eventually, it will look like a
12 ladder.

13 So this is just a symbol that we have a
14 message that's going to go from a wireless terminal,
15 from the cell phone, to the messaging server, and it
16 can be a text message or it can be a multi-media
17 message. It doesn't make a difference.

18 Q Okay. And then now, after that message is
19 received at the messaging server, now is -- are the
20 four steps in the claim -- did they follow?

21 A Yes. So we're going to look at -- so now I have
22 this big number one, and this is the first
23 limitation, or the first step, in claim one. So the
24 little "1" on top is claim one and the big "1" is I'm
25 numbering the steps.

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1 So the first step says, and it's a lot of
2 language, "Sending an inquiry from the messaging
3 server to the cellular network to determine sent
4 information relating to the terminal." So you're
5 going to send an inquiry, the inquiry comprising a
6 first identifier. Like a phone number, you're going
7 to have an identifier, the first identifier being a
8 specific identifier external to the cellular network.
9 And so it's a lot of language that we have an
10 inquiry -- and this is what I've shown on the left --
11 going from the messaging server to the cellular
12 network that needs to include a first identifier.

13 Q Okay. And later on, when we look at Sprint's
14 network and Sprint's documents are we going to parse
15 the language of this claim in more detail?

16 A Yes.

17 Q Okay. Is the purpose right now just to give a
18 high level summary?

19 A Yes.

20 Q Okay. So what happens next?

21 A So next, we're going to have step two, step
22 three, and step four, and those steps happen in the
23 cellular network. So the cellular network is going
24 to receive this inquiry, and the first thing it's
25 going to do, it needs to do a mapping from the first

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1 identifier to a second identifier. So there is a
2 mapping that needs to happen in the cellular network,
3 and then there's language that the second identifier
4 is internal. We're also going to have definitions
5 from the Court. We're going to go through that
6 later. So this is step two.

7 Q Okay.

8 A This is the mapping.

9 Q Okay.

10 A The third step is the determining, determining
11 information, sent information, relating to the
12 terminal with the aid of the second identifier. So
13 the cellular network needs to take the second
14 identifier and find something about the phone,
15 determine the -- you know, anything that's con --
16 that's information, whether, you know, the phone can
17 receive a message, the phone is on, you know. Any
18 information that needs to be determined has to be
19 done with the aid of the second identifier and needs
20 to be done in the cellular network, which then gets
21 us to step four.

22 The cellular network has determined that,
23 and now it's going to go back and tell the messaging
24 server -- it's going to send in a response. So we're
25 going to have a response that's now going to go as a

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1 result of this inquiry to the messaging server, and
2 it's going to contain -- it's going to relate to the
3 terminal and it's going to be with the aid of sent
4 first identifier.

5 Q Okay. So you described this type of diagram as a
6 call flow?

7 A Yes.

8 Q And, again, can you just slowly explain to the
9 jury how you read a call flow?

10 A Yes. So I drew the diagram on the left. This is
11 me explaining the steps graphically in what we call a
12 call flow diagram. And so this is read normally top
13 to bottom. So you look at the arrows and you -- the
14 arrow that's on top comes first and you read it left
15 to right. So even if I don't look at the claim, if I
16 just have the figure on the left, I can say okay, so
17 one, I send a message; two, I have an inquiry and I
18 can see that it's going from the messaging server to
19 the cellular network; and then, for example, you know
20 step three isn't shown here, but step four, I have a
21 response that goes back. So this is how you read a
22 call flow.

23 (Pause in proceedings.)

24 Q Okay. Are --

25 THE COURT: I think we're going to try to

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1 keep that to a -- that noise to a minimum. If any
2 juror cannot hear, I want to see a hand.

3 BY MR. GOETTLE:

4 Q All right. So are you now going to show the
5 figures of the patent and explain the Court's
6 construction of "cellular network?"

7 A Yes. So we're still trying to understand the
8 patent and we're still looking at the patent. And so
9 in the specification of the patent there are figures
10 that explain the invention. But the Court also gave
11 us definitions, and those definitions I understand
12 are in your folder, and there are multiple
13 definitions.

14 The first definition, which I think you've
15 seen, is an important definition. They're all
16 important, but this is specifically related to the
17 definition of a cellular network. And as an expert,
18 I take the definitions that the Court has provided
19 and that's what I apply in all my analysis. So I
20 have looked at this definition and now I'm just going
21 to go over the definition.

22 So it talks about a cellular network needs
23 to have three main things. Of course they need to
24 have the wireless terminal, we need to have a cell
25 phone, and I don't think that's disputed. You need

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1 to have a bay station system. And so this is in
2 figure one, you have the figure -- you have the
3 patent in your binders. So the -- you have the BSS.
4 Those are the towers and the computers at the bottom
5 of the towers that communicate with the wireless
6 terminal. And the next thing is you need to have the
7 core network elements.

8 The Court says core network elements may
9 include, and it gives us a list, like subscriber
10 databases, mobile switching centers, packet switching
11 nodes, and messaging servers.

12 Q Okay. And I see that you have on slide 48 a
13 picture of those switchboard operators. Could you
14 explain to the jury why you have that on there?

15 A Yeah. So this is just my analogy, trying to
16 remind the jury the core network elements -- and it's
17 easy to visualize the cell phone. And the tower --
18 if you're driving on the highway you actually see
19 sometimes -- if you're looking for them, you see the
20 cell phone towers. The core network elements are the
21 component that you don't see. Those are the ones
22 that are in -- you know, in data centers, they're
23 underground, those are what perform core
24 functionality. And this core functionality, we have
25 to look at the definition. They're core network

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1 elements in a cellular network. So not just that
2 they're important or they're essential, they are
3 essential to a cellular network.

4 So in my analogy, those are what allows the
5 call to communicate with each other and the call to
6 connect to the internet or connect to the land lines.
7 This is what allows the phones to communicate with
8 outside networks.

9 THE COURT: Let's hold it. Michael --

10 COURTROOM DEPUTY: Yes.

11 THE COURT: -- ask how long they're going
12 to be.

13 COURTROOM DEPUTY: Yes.

14 (Pause in proceedings.)

15 THE COURT: We are going to get the
16 representative of the clerk's office -- the clerk
17 manages the building -- and get that stopped.

18 MR. GOETTLE: Do we have like a really long
19 broomstick?

20 THE COURT: It would have to be a pretty
21 long broomstick. I'm debating whether we should
22 recess early. I don't like to do that. I like to
23 break up the day.

24 MR. GOETTLE: Your Honor, we're getting to
25 the good part.

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1 THE COURT: I'm concerned that the jury
2 won't be able to hear. Is everyone hearing the
3 witness? Everyone -- anyone not hearing the witness?
4 I think we ought to go forward.

5 MR. GOETTLE: Okay.

6 THE COURT: It's a little distracting, but
7 if it gets to the point where you are distracted and
8 are having trouble, let's see a hand and we will
9 recess. And we'll see how much influence I have
10 around here --

11 MR. GOETTLE: Judge --

12 THE COURT: -- with whether we can stop the
13 noise. What they're doing, they're reconfiguring
14 another courtroom. This one was done very recently.
15 I hope when they did the work here they didn't
16 disturb any other judges. But the courtroom just
17 above ours is being done now and it's something of an
18 intrusion. So let's try to proceed.

19 MR. GOETTLE: Okay, Your Honor.

20 THE COURT: And in the meantime, I'm going
21 to try to do something. You may proceed.

22 MR. GOETTLE: Thank you.

23 BY MR GOETTLE:

24 Q Dr. Akl, just to be absolutely clear -- I may
25 have just asked you this, but I'm not sure. Can you

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1 explain to the jury what a core network element is
2 under the Court's construction of this 1999 patent?
3 A So we're looking at a core network element in a
4 cellular network and it has to -- the Court doesn't
5 define, doesn't give us a definition of "core network
6 elements," so we use the ordinary meaning for the
7 word "core," which means "essential." That's what
8 "core" means. The Court's definition gives us
9 examples of what it may include, so the list here
10 says, "...which may include subscriber databases,
11 such as home location registers," and those are going
12 to be like subscriber databases that include the
13 location of the phone, "mobile switching center,
14 packet switching nodes, and messaging servers."
15 Those are examples that may be in the list based on
16 what a core network element.

17 So you have to look at the functionality.
18 Is a device essential in a cellular network? The
19 context is also very important. And when we look at
20 what "essential" or what "core" is in a cellular
21 network in order for the phone to communicate with an
22 external network or the phone to complete the call
23 with a land line or with another cell phone. And so
24 that is what defines an element. And a decision is
25 that element a core network element or not?

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1 Q Okay. So does the patent disclose any elements
2 that qualify as being core network elements?

3 A Yes. So what you're looking at now are figures
4 one and figure two from the patent, and what I've
5 done is I've just added the green highlighting,
6 giving you examples of in the patent, how the patent
7 gives you example of core network elements. So the
8 MSC, that's another acronym, mobile switching center.
9 A mobile switching center is what does the switching
10 for the calls. So it is a core network element. It
11 is essential.

12 An SGSN or GGSN, I'm looking here, those
13 are packet switching nodes. So in a cellular you can
14 have what we call like the old-fashioned -- even in
15 the cellular, like the circuit switch calling or the
16 packet switching calling, which means the call itself
17 does -- is divided into packets the way, for example,
18 you have internet traffic as packets. Those would be
19 handled by packet switching nodes. And the
20 traditional calling in a cellular network can be
21 handled by switching in a mobile switching center
22 where you create a connection and the connection is
23 maintained -- it's called connection -- while the
24 call is going on, versus you can have packets that
25 you don't necessarily need to maintain the

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1 connection, but you have the packets.

2 So the -- these are essential because both
3 of them do the switching of the call and do the
4 switching of the packets. So this is an example in
5 figure one.

6 Q Before you go to figure two, Dr. Akl, could I
7 interrupt you for a second?

8 A Sure.

9 Q So I just want to make sure I understand it.
10 The -- you referred to two different types of
11 technology it sounds like, circuit switching and
12 packet switching?

13 A Yes.

14 Q Okay. In the -- in the old wired phone systems
15 of our phones that were hanging on the wall in the
16 kitchen and we would use those to make phone calls,
17 was that one of those two types of technologies?

18 A Yes. So that was circuit switch. And even when
19 they started building the cellular network like first
20 generation and second generation, it's similar
21 technology. It as mobile. You can take the phone
22 with you. But it still had a similar connection
23 orient called circuit switch all.

24 Q Okay. And then so the mobile switching center,
25 the box that's labeled MSC, that is a computer or a

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1 set of computers specialized for what kind of
2 technology?

3 A For the circuit switching capability.

4 Q Okay. Can an MSC, a mobile switching center,
5 handle the switching that is needed for a packet
6 switching network like the internet?

7 A Those are usually handled by packet switching
8 nodes.

9 Q Okay.

10 A And those are what we see also in the diagram.

11 Q Okay. And those nodes, the MM -- MSC, mobile
12 switching center, and then what you have labeled as
13 the packet switching nodes, do they make decisions in
14 terms of how to connect the phone to other phones or
15 the phone to other networks?

16 A Yes. This is why they're core. This is why
17 they're essential. This is why they are core network
18 elements in a cellular network because they are
19 making the decisions of how to connect the phones in
20 a cellular network to the other phones, to the land
21 lines, and to the internet.

22 Q Now, how do those components, those computers,
23 that are making those decisions correlate to your
24 analogy to the network operators in the picture that
25 you have on the slide?

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1 A So in my slide of the operators, that's like the
2 switchboard. So when you connect the -- when you
3 take a wire and when an operator plugs it in and --
4 plugs it in, what Lily Tomlin is doing, the
5 connections, that's what those nodes are doing.

6 Q Okay, thank you.

7 A It's completing the call, completing the switch.

8 Q Okay. And you -- I interrupted you. You were
9 about to explain figure two of the patent?

10 A Yes. So in figure two we have additional core
11 network elements. And we see the packet switching
12 nodes that we looked at before, but there is a
13 subscriber database and it's labeled "HLR," which is
14 actually home location register, and this is a
15 subscriber database that is a core network element
16 because it maintains, among other things, the
17 location of the mobile phone. As a mobile phone,
18 you're going to be moving around, and the network
19 needs to know the location of the phone, it needs to
20 know if the phone is registered, it needs to know if
21 the phone is on, so when you get a call you can
22 deliver that call. And that information is
23 maintained in the HLR, the home location register.

24 Q Okay. And do cellular networks typically have
25 more subscriber databases than just the home location

1 register, HLR?

2 A Yes. You can have other essential databases.
3 The HLR in itself has a standard, and a lot of times
4 if a network wants an additional subscriber database
5 to maintain additional information that is essential,
6 they don't want to overload the HLR, so there could
7 be another subscriber database. Not every subscriber
8 database is going to be core. So you have to look at
9 it on a case by case basis. You have to look at the
10 functionality of the subscriber database and ask
11 yourself the same question for every one of these, is
12 it core? Is it essential to a cellular network? If
13 it is, it would fall in this list. If it's not, it
14 would not.

15 Q Okay. So how do subscriber databases, and in
16 particular, the home location register, how do
17 subscriber databases correlate to your analogy of the
18 network operators shown in the picture?

19 A So going back to my picture, it may be hard to
20 see, but in front of every person there's a white
21 little notebook. And for the operator to connect the
22 call they actually have to do a lookup, like they
23 don't memorize which one goes where, of course. So
24 you get a call, they listen to it, they look in their
25 flip book, they look up the subscriber information,

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1 and then they know what to connect. So the act of
2 looking up to determine what to connect to what is
3 what the subscriber database now does in computers.

4 Q Okay. Okay. So looking at the Court's
5 construction, and just the part of the Court's
6 construction on core network elements, you have
7 talked about subscriber databases such as a home
8 location register, right?

9 A Yes.

10 Q And you have talked about -- with reference to
11 the figure of the patent, you have just talked about
12 mobile switching centers?

13 A Yes.

14 Q And you have just talked about packet switching
15 nodes?

16 A Yes.

17 Q Okay. But you haven't yet touched on messaging
18 servers?

19 A Correct.

20 Q So --

21 A We're going to do that next.

22 Q Okay. Are messaging servers in the patent
23 disclosed as core network elements?

24 A No, the patent describes -- if you want to get
25 rid of my highlighting.

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1 Q Oh. Oh, yes, let me do that.

2 A So in figure two, this is the MMSC, which is the
3 multi-media messaging server for MMS, and in the
4 patent it's described as -- it can be internal, it
5 can be external. So it can be core. You have to
6 look at its functionality to determine if it is going
7 to be a core element or not. And in the patent the
8 invention is we're not going to make it core. We are
9 going to have it not be a core network element
10 because when you go back to the problem we don't want
11 congestion in the cellular network, so we don't want
12 the messages congesting the cellular network. So we
13 want in the patent, the preferred environment, is the
14 MMSC be not a core network element.

15 Q Okay. And looking at the slide, the Court has
16 given us a construction, so a meaning of "messaging
17 server" under this patent?

18 A Yes. So just like the Court gave us a definition
19 for "cellular network," the Court gave us a
20 construction for "messaging server," and the
21 messaging server needs to have two functionalities.
22 The first functionality is store and forward
23 messages. The second functionality, it needs to be
24 able to send an inquiry for information relating to a
25 wireless terminal.

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1 Q So let's just take the first box. And could you
2 please explain to the jury what it means by storing
3 and forwarding messages?

4 A Yes. So when you text that text is going to go
5 first to a messaging server where it's going to store
6 it and hold on to it. So this functionality, the
7 storing and then when the phone is ready be able to
8 deliver it, this store and forward functionality,
9 this is not a core network functionality in a
10 cellular network. And that's what this functionality
11 means. You're going to store and then you're going
12 to forward.

13 Q Okay. And the second part of a messaging server,
14 it has to send an inquiry for information relating to
15 a wireless terminal. Can you explain that to the
16 jury?

17 A Yes. So the messaging server needs to know
18 something about the phone. It only knows the phone
19 number. It needs to know about the phone that's
20 going to be -- that the message is going to, for
21 example. And so it needs to have the functionality
22 of being able -- of sending an inquiry that is asking
23 the cellular network information about the phone
24 that's going to receive it. So it's going to give
25 it, for example, the phone number and it's going to

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1 tell it okay, what do you know about this phone.

2 So, again, this second functionality is not
3 a core functionality on its own because sending an
4 inquiry for information relating to the wireless
5 terminal is not an essential functionality in a
6 cellular network.

7 Q Okay. Dr. Akl, could you explain to the jury how
8 then if the Court has construed a messaging server as
9 a potential core network element, how then a
10 messaging server would be a core network element if
11 the two functions there are not core functions of a
12 cellular network?

13 A Yes. So the -- those functionalities are not
14 core essential functionalities. And one reason is if
15 we look at the definition, the definition says, "Core
16 network elements may include..." so having just
17 these two definitions doesn't make it core because
18 otherwise, it would always be a core network element.
19 So these definitions on their own does -- if we look
20 at those definitions and those functionalities, it
21 doesn't make a messaging server a core network
22 element. But the Court told us that the messaging
23 server may be a core network element. So for a
24 messaging server to be a core network element we have
25 to take the messaging server and we have to have core

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1 functionality being performed in this messaging
2 server.

3 So in addition to these two
4 functionalities, the messaging server needs to be
5 able to do, for example, something that is essential
6 in a -- in a core -- in a cellular network, core
7 functionality. So if I take my messaging server and
8 I take, for example, my mobile switching center, and
9 I take the functionality of switching, of a mobile
10 switching center, and I put it in my messaging
11 server, then my messaging server becomes a core
12 network element. But if I only have these two
13 functionalities in a core -- in a messaging server,
14 then it is not a core network element.

15 Q So, Dr. Akl, back in -- back at the time of the
16 invention was it known that you could have
17 switching -- by "switching," are you referring to the
18 mobile switching center?

19 A Yes.

20 Q Was it known back at the time of the invention
21 that you could have your mobile switching center also
22 performing messaging server functions or other types
23 of functions?

24 A Yes, so -- and I -- and it is. So for -- we have
25 to go back to -- thinking back to 1999 when the

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1 patent was written, and we go back to even before
2 that, in the mid-90s. In the mid-90s, text messages
3 were small and they weren't even that prevailing and
4 they weren't used that much. So it was not uncommon
5 or unfeasible or unviable to take -- to have a server
6 that's going to do the switching and that's also
7 going to do the messaging server functionality.

8 So what we have here, as an example, this
9 is an Ericsson patent. This patent was filed in '95,
10 so it was filed, you know, four years before the
11 patent in question, the Comcast patent. And it was
12 issued in August '99. So it was filed and it was
13 issued before the current patent. And this Ericsson
14 patent actually describes -- if you go to the next
15 slide -- describes a mobile switching center that
16 includes a messaging center. And it also says
17 alternatively, they can be implemented in standalone
18 fashion.

19 So back in the mid-90s, you could have a
20 messaging -- a messaging server that is also doing
21 core functionality like mobile switching where they
22 have them all on one computer, or you could have them
23 separate. So you have -- this is a very, very
24 important point. So you have to look at the
25 functionality of what they are doing. If a device is

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1 doing core network functionality, it is a core
2 network element in a cellular network. So we have to
3 look at the functionality, we have to determine is it
4 core, is it essential, and not just essential, in
5 general, or essential for business, it has to be
6 essential for a cellular network in '99.

7 Q And going to slide 53, what -- are you showing
8 another quote form the patent?

9 A Yes, so now we're switching. So we're done with
10 the Ericsson patent. I just had two slides on it.
11 So this is back to the Comcast patent. This is the
12 patent in question here. So the specification of
13 this patent, let's say we want the messaging server
14 would preferably be located outside. And this is
15 exactly what we're saying, we're going to take the
16 functionality of the messaging server. It's only
17 going to be doing two things: store and forward, and
18 it's going to be asking an inquiry. By only doing
19 these two things, it's no longer a core network
20 element. And so it is outside.

21 So when we talk about outside and inside or
22 external, we're not talking about geographic
23 location. It doesn't matter where it's located.
24 That doesn't make it outside or inside. We talk
25 about functionality. Is it core or is it not core to

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1 a cellular network? This is probably the most
2 important concept in this case.

3 Q So yesterday, you were -- you were at the opening
4 argument of Sprint's attorney?

5 A Yes.

6 Q Okay. And did you hear Sprint's attorney talking
7 about the location of Sprint's messaging servers in
8 Sprint's network?

9 A Yes.

10 Q Can you tell the jury what the attorney said, if
11 you can remember?

12 A Yeah, you know, he drew a picture and he -- I was
13 here, and he put the messaging server in the middle
14 of the picture and he said, oh, see, it's inside.
15 And he said Dr. Akl is going to move it. I'm not
16 moving it. He was wrong. He was mischaracterizing
17 what I'm going to be saying. And what he said is
18 irrelevant to the analysis. The geographic location
19 is irrelevant. The -- when the patent is describing
20 location we're not talking geography, we're not
21 talking where does Sprint put a messaging server,
22 where does -- we are talking about is a messaging
23 server core network element in a cellular network.

24 So from a business point of view, it may be
25 very important. For a messaging network -- we

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1 haven't talked about messaging network yet -- it may
2 be important. That's all irrelevant. We have to
3 look at is it -- not where it's physically located,
4 but we have to look at the functionality. Is it a
5 core network element in a cellular network?

6 Q Would a skilled artisan -- trying to decide what
7 makes up a cellular network under the Court's
8 construction would a skilled artisan look at the
9 geography of where Sprint has placed its messaging
10 servers in relation to where Sprint has placed its
11 other elements of its cellular network?

12 A No, that would be completely irrelevant to the
13 analysis.

14 Q So when the -- when the patent and the claim
15 refers to a messaging server being external to a
16 cellular network can you please explain to the jury
17 how that correlates to the Court's construction of
18 "cellular network?"

19 A Yes. So the -- so going back to the Court's
20 construction, the Court gave us a definition of
21 "messaging server." You need to have these two
22 functionalities. Those on its own don't make it core
23 because, again, the Court's construction says it may
24 be. So if those two functionalities makes it core,
25 then it would always be the case.

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1 So because the Court's construction says it
2 may be -- so, again, we need to have core
3 functionality, additional core functionality, that is
4 other than the two functionalities of a messaging
5 server, that's in the messaging server and that's the
6 only way for the messaging server to be a core
7 network element. And in that case it's internal,
8 it's part of the cellular network. Otherwise, it's
9 external to the cellular network. But its physical
10 location is irrelevant.

11 Q Dr. Akl, while we're on the subject of
12 yesterday's openings, did you hear Sprint's lawyer
13 characterize the Nokia patent, as it got referred to
14 yesterday, as being centric to what was termed
15 yesterday as the old style, European standard, which
16 I think you talked about earlier today as being --
17 meaning GSM?

18 A Yes.

19 Q And did you get a sense of what Sprint's lawyer
20 was telling the jury in that -- when he was talking
21 about that?

22 A Yeah, he was -- he was wrong. He was really
23 mischaracterizing what's in the patent. The patent
24 itself is not limited to just GSM. And, in fact, on
25 the first column of the patent, the background, it

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1 talks about CDMA, it talks about CDMA2000. CDMA and
2 GSM were developed around the same time. The --
3 those were both second generation. CDMA2000, which
4 is third generation, was developed around the same
5 time as third generation GSM. And the patent itself
6 mentions both. So his characterization was
7 incorrect.

8 Q I'm sorry, Dr. Akl, I didn't mean to distract
9 you.

10 MR. GOETTLE: But we just put up on the
11 screen PX-2, Your Honor. This is the patent that's
12 in evidence already.

13 BY MR. GOETTLE:

14 Q Can you --

15 A If we go to column one --

16 Q Column one. What -- you don't have the patent up
17 there, do you?

18 A No, but I know if you zoom in like to the kind of
19 like lines -- it's hard to see. The third part --
20 like down. A little further down.

21 Q Around line 29.

22 A Yes. Okay. And go up more. So starting on,
23 "For a long time..." It's the last two lines
24 actually on this, so blow up the body part.

25 (Pause in proceeding.)

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1 A Yes. So here, you see the patent --

2 THE COURT: What column? Why don't we --

3 MR. GOETTLE: I'm sorry.

4 THE COURT: -- identify it?

5 MR. GOETTLE: I'm sorry, Your Honor. We're

6 at column one of PX-2, which is on page seven of

7 PX-2, and we're at approximately line 29.

8 THE COURT: Fine.

9 THE WITNESS: Well, actually, right now
10 we're at lines like 55 to 60.

11 BY MR. GOETTLE:

12 Q Is that where you want to be?

13 A Well, we can -- we can move back and forth.

14 Q No, no, no. Okay.

15 MR. GOETTLE: I'm sorry, Your Honor, we're
16 at lines 55 to 60.

17 THE WITNESS: But we can -- we can start at
18 29.

19 BY MR. GOETTLE:

20 Q I might be wrong. Oh, you know what, I was
21 misreading it. I was misreading it. I'm sorry.
22 Please. And I'm sorry to interrupt you, Doctor.

23 A Okay.

24 Q Please go ahead.

25 A Okay. So go back to lines -- go back to the

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1 part -- 55 to 60. There we go. And if you --
2 counsel, if you could please remove my highlighting.
3 Thank you. Okay. So this is the background of the
4 patent. This is -- you have the patent. This is the
5 first column. It talks about the background of the
6 invention. And lines 57 start -- it describes, you
7 know, GPRS networks, third generation mobile, such as
8 CDMA2000, and it says code division, multiple axes,
9 and WCDMA. So it is equally applicable to both CDMA,
10 CDMA2000, and wideband CDMA, which is -- so CDMA2000
11 is the technology that Sprint uses.

12 Q Okay. And I think it would be good to tell the
13 jury what part of the patent we're in.

14 MR. GOETTLE: So can you -- can you go up
15 and show line 30?

16 (Pause in proceedings.)

17 MR. GOETTLE: And blow up where it says
18 "Background of the Invention."

19 (Pause in proceedings.)

20 BY MR. GOETTLE:

21 Q So what is this section of the patent? This is
22 one of the section of the 870 patent, correct?

23 A Yes.

24 Q What is this section?

25 A So this is the background section of the

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1 invention. This is where the inventor talks about
2 the background, what the -- what the invention is
3 about in terms of where it may be applicable and what
4 it's used for. So this is the background section,
5 and the background section very clearly describes and
6 says that it is -- you know, it's equally applicable
7 to CDMA, to GSM, to CDMA2000. It's not dependent on
8 the things that differentiate, for example, CDMA from
9 GSM. It's -- what we're looking at, the
10 functionality of having a messaging server, moving
11 those messages, sending an inquiry, this is equally
12 applicable to both technologies.

13 Q Okay. And so you referred to CDMA2000 and
14 earlier today you were talking about 2G or 3G. Where
15 does CDMA2000 fall in?

16 A CDMA2000 is third generation. So it's what CDMA,
17 which was second generation, evolved to, CDMA2000, so
18 it's 3G.

19 Q And what kind of network does Sprint have?

20 A This is the network Sprint has. Sprint has a 3G
21 CDMA2000.

22 Q Okay. And does the patent refer to the
23 application of the invention in 3G type of networks?

24 A Yes. So if we go, for example, to column four,
25 there is another -- line 30 --

1 Q Oh, by the way, I have a copy of the patent.
2 Would you like a hard copy?

3 A Okay.

4 MR. GOETTLE: Is it okay if I approach the
5 witness, Your Honor?

6 THE COURT: Yes.

7 (Pause in proceedings.)

8 THE WITNESS: So if we can please blow up
9 from line like 25 to 40?

10 (Pause in proceedings.)

11 THE WITNESS: "In connection with the
12 present application the concept of cellular network
13 should be interpreted broadly." And it goes on and
14 it describes, for example, you can have GPRS, GSM,
15 and network elements of the core network of a third
16 generation network. So it's equally applicable to
17 different third generation networks. CDMA2000 is one
18 type of third generation network, so the patent is
19 applicable to both.

20 MR. GOETTLE: Okay. Can we go back to the
21 slide, please?

22 (Pause in proceedings.)

23 THE COURT: When you're ready to break --
24 just keep it in mind.

25 MR. GOETTLE: Your Honor, the timing is

1 good. We are now going to the fourth of only five
2 topics that Dr. Akl is going to cover, but that would
3 be -- seems like a good time to break, or I think we
4 could be through this section I'm thinking in 15
5 minutes. So whichever you would prefer.

6 THE COURT: Why don't we take a break?
7 It's 12:30. We've been at it since 9:30. I think a
8 break is appropriate. So we'll recess for lunch for
9 one hour. Be back in the jury room oh, about 25
10 minutes after 1:00. We hope to start promptly at
11 1:30. Take your books with you. And remember my
12 instructions. I'm not going to repeat them.

13 (Jury out, 12:29 p.m.)

14 THE COURT: Be seated, everyone. You
15 may -- no, you may step down, Doctor. Several
16 things. First, I want a hard copy of DX-150. I
17 don't need it right now.

18 Secondly, how are we going to handle Dr.
19 Akl's slides if the jury requests copies? Do you
20 have hard copies?

21 MR. FINKELSON: Our view -- oh, go ahead,
22 Dan.

23 MR. GOETTLE: The answer to your question
24 is yes, I have hard copies. And we are fine with the
25 jury having a copy of the slides.

1 MR. FINKELSON: Our view would be they are
2 demonstrative evidence, Your Honor. The same rules
3 would apply when we present our expert testimony and
4 those wouldn't go back with the jury.

5 THE COURT: His testimony is too
6 intertwined with the slides. The same rule would
7 apply for your slides as well.

8 MR. FINKELSON: We're happy to proceed
9 however the Court would like. I haven't had an
10 instance before where demonstratives go back, but if
11 that's the Court's preference and it's going to be
12 the case for both sides, then obviously that's how
13 we'll proceed. And I'm going to -- I'm going to grab
14 you a copy of 150. We have it. Okay.

15 THE COURT: Well, you don't have to do it
16 right away. Fine.

17 MR. GOETTLE: Your Honor, I had a case in
18 front of Judge Robinson in the District of Delaware,
19 and she had the demonstratives go back for the very
20 same reasons that you just said, so it is fine with
21 us to do that.

22 THE COURT: Well, some demonstratives will
23 not go back, for example, demonstratives used in
24 closings --

25 MR. GOETTLE: Sure.

1 THE COURT: -- where you're summarizing the
2 evidence.

3 MR. GOETTLE: Yeah.

4 THE COURT: That's a demonstrative that
5 does not go back.

6 MR. GOETTLE: Right.

7 THE COURT: But where there's a close
8 connection between the testimony and the exhibit, I
9 think the exhibit should go back. And I think that
10 makes it easier for the jury to comprehend the
11 testimony.

12 MR. FINKELSON: And, Your Honor, as I said,
13 we have no problem with this.

14 THE COURT: Fine. And the rule applies, of
15 course, to both sides. I gather that your experts
16 are going to do the same things?

17 MR. FINKELSON: Our experts will certainly
18 do the same thing.

19 MR. GOETTLE: They are now, Your Honor.

20 THE COURT: All right.

21 MR. FINKELSON: Although I will say that
22 these graphics are nicely prepared --

23 MR. GOETTLE: All right.

24 MR. FINKELSON: -- and well done.

25 THE COURT: Is there anything else that we

1 need addressed? I think not, but I'll hear from you.

2 MR. GOETTLE: You know what, Your Honor,
3 I'm just thinking, I meant to take a picture of Mr.
4 Finkelson's opening drawing and --

5 MR. FINKELSON: We took one for you.

6 MR. GOETTLE: Okay, thank you. And okay,
7 so we'll take a picture and I guess we'll just
8 exchange that and --

9 MR. FINKELSON: Okay, certainly.

10 MR. GOETTLE: I think the picture should go
11 back as well, Your Honor. It's a demonstrative
12 that's -- for the same reason that the slide deck --

13 MR. FINKELSON: We have no objection to
14 both of those going back, Your Honor.

15 THE COURT: Well, if that's the case, then
16 I'm not going to rule. You ought to take a picture
17 of -- how did you identify it?

18 MR. FINKELSON: "Bad Drawing Number 1" was
19 mine yesterday, but I amended it at Your Honor's
20 request. I think we did "Defendant's Drawing Number
21 1."

22 THE COURT: All of the drawings that are
23 not recorded elsewhere I want photographed.

24 MR. FINKELSON: Yes, sir.

25 THE COURT: Including the one Dr. Akl drew.

1 I've forgotten how you identified that.

2 MR. GOETTLE: "Plaintiff's Drawing Number
3 1."

4 THE COURT: All right. Well, it's a good
5 idea not to have different sets of numbering when
6 you're talking about one side numbering exhibits.
7 It's always good to keep the exhibits flowing in
8 relatively close chronologic order so that we don't
9 have one set of exhibits and then drawings and then
10 other numbers. It makes it a little hard to track
11 the record. So keep that in mind. So photographs
12 though -- the moral of the tale, I want photographs
13 of all these exhibits that have been used, such as
14 Dr. Akl's whiteboard. Anything else?

15 MR. FINKELSON: Not for us, Your Honor.

16 THE COURT: All right. We're in recess
17 until 1:30. You may go about your business.

18 (Luncheon recess taken, 12:34 p.m.)

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25

I N D E XPLAINTIFF'S WITNESSES DIRECT CROSS REDIRECT RECROSS

David Marcus

By Mr. Hangley 24 58

BY Mr. Finkelson 34

Robert Akl

By Mr. Goettle 78

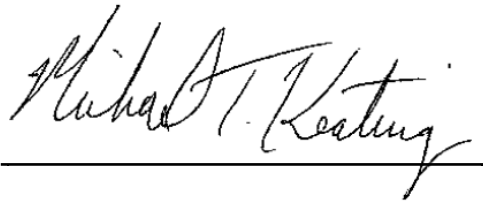
* * *

CERTIFICATION

I, Michael Keating, do hereby certify that
the foregoing is a true and correct transcript from the
electronic sound recordings of the proceedings in the
above-captioned matter.

2/2/17

Date

A handwritten signature in cursive script, reading "Michael T. Keating", written over a horizontal line.

Michael Keating